166 US 375
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 367. 98

THE STEAM YACHT "CONQUEROR," HER TACKLE, APPAREL, AND FURNITURE, J. SLOAT FASSETT, CLAIMANT, APPELLANT,

vs.

FREDERICK W. VANDERBILT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED APRIL 16TH, 1894.
RETURN FILED NOVEMBER 15, 1894.

15576.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States circuit court of appeals for the second circuit, greeting:

Being informed that there is now pending before you a suit in which the steam yacht "Conqueror," her tackle, apparel, and furniture, J. Sloat Fassett, claimant, is appellant, and Frederick W. Vanderbilt is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
b Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of May, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

c (Endorsed:) Supreme Court of the United States. No. 1192. October term, 1893. The steam yacht "Conqueror," &c., vs. F. W. Vanderbilt. Writ of certiorari.

d UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do hereby certify that the following pages, numbered from 1 to 224, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Frederick W. Vanderbilt, libellant and appellee, against the steam yacht "Conqueror," her engines, &c., J. Sloat Fassett, claimant and appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of the independence of the United States the one hundred and nineteenth.

[SEAL.] JAMES C. REED, *Clerk.*

e United States circuit court of appeals for the second circuit. Frederick W. Vanderbilt, libelant and appellee, vs. The steam yacht "Conqueror," her engines, &c., J. Sloat Fassett, claimant and appellant. Transcript of record. Appeal from the district court of the United States for the southern district of New York. Printed under the direction of the clerk. United States circuit court of appeals, second circuit. Filed Mar. 9, 1893. John A. Shields, clerk.

1 1 United States district court, southern district of New York.

FREDERICK W. VANDERBILT
against
THE STEAM YACHT "CONQUEROR," HER TACKLE,
2 &c., and against J. Sloat Fassett.

STATEMENT.

Libel filed September 1, 1891.

Answer of J. Sloat Fassett, as collector of the port, filed October 15, 1891.

Answer of J. Sloat Fassett, in personam, filed October 15, 1891.

Answer of Francis Hendricks, collector of customs, for and on
3 behalf of the United States, filed October 15, 1891.

The "Conqueror" arrested October 8, 1891, in the waters of Kings County, N. Y.

Cause tried before Hon. Addison Brown, judge, and decision rendered January 28, 1892.

4 2 Reference to Samuel H. Lyman, esq., U. S. commissioner to assess damages, January 29, 1892, and entry of final decree reserved until his report.

Commissioner's report June 20, 1892, assessing libelant's damages at $20,854.47.

Exceptions to commissioner's report, June 23, 1892.

Exceptions argued and decided July 7, 1892, and deduction of $162.31 made by Judge Brown from amount in commissioner's report.

Final decree entered July 20, 1891.

5 Notice of appeal filed July 21, 1892.

Assignment of errors filed July 21, 1892.

To the honorable the district court of the United States in and for the southern district of New York:

The libel of Frederick W. Vanderbilt, owner of the vessel or steam yacht "Conqueror," her tackle, apparel, and furniture, against all
6 persons intervening for their interest therein, and against J. Sloat Fassett, who is now in possession thereof, in a cause of possession, civil and maritime, alleges as follows:

First. That libelant is a native-born citizen of the United States, residing in the city of New York.

Second. That said vessel was built in the year 1889, at Glasgow, Scotland; that she is a seagoing, schooner-rigged, screw steamship; that her length is $182\frac{6}{10}$ feet; her main breadth, $24\frac{8}{10}$ feet; her
7 3 depth, $13\frac{5}{10}$ feet; her gross tonnage, $371\frac{91}{100}$ tons, and her net tonnage, $219\frac{20}{100}$; that she was designed, intended and constructed to navigate the high seas, not in the conveyance of passengers or merchandise for hire, but as a pleasure yacht only, and such is the only use to which she has ever been put, or is intended to be put by libelant.

Third. That on or about the 7th day of May, 1891, Walter Samuel Bailey, of Kingston-upon-Hull, England, then being the registered owner of said yacht, sold and delivered her to this libelant by bill of

sale in due and usual form, and this libelant at all times since has been and now is the true and only owner thereof, and of her tackle, apparel, and furniture.

Fourth. That after the purchase of said yacht libelant cruised with her in the waters of Great Britain and Norway and upon the high seas till about the middle of June, 1891, when, by direction of libelant, she was navigated by her master to Halifax, and thence to the United States, arriving in the port of New York on or about the 6th day of July, 1891; that said master thereupon made due entry of said vessel at said port, and reported her arrival to the collector of customs of said port, and delivered to said collector the manifest as prescribed by law; that said collector thereupon levied and collected on said yacht "light money," pursuant to section 4225 of the Revised Statutes of the United States; that upon arrival at said port, as aforesaid, the master of said yacht also presented to said collector said bill of sale for record and certification; that said collector thereupon recorded said bill of sale in his office, and having endorsed upon the original thereof the following certificate, delivered back the same so endorsed to said master, namely:

"I, Joel B. Erhardt, collector of customs for the port of New York, in the State of New York, in the United States of America, do hereby certify that the within bill of sale, bearing date of May 8th, 1891, of the foreign-built (British) yacht 'Conqueror,' length 182 6/10 feet; breadth 24 8/10 feet; depth 13 5/10 feet; that she has a figurehead and elliptic stern, one deck and two masts; that G. W. Lyon, surveyor, has certified that she measures 237 81/100 tons, as follows:

Capacity under tonnage deck		346.04	tons.
Break, aft		2.17	"
House, forward		17.14	"
" aft		4.45	"
Chart house, amid		2.11	"
		371.91	" gross.
Prop. power	134.12		
Crew space, 5/00	18.59		
	152.71		
		219.20	net tonnage.

"Sold and transferred by W. S. Bailey to Frederick W. Vanderbilt, is in the form and substance valid and effective in law, and has been duly recorded in my office, and the said Frederick W. Vanderbilt is a citizen of the United States. As witness my hand and seal this 13th day of July, in the year of our Lord eighteen hundred and ninety-one.

[L. S.] "THOMAS J. DUNN,
Deputy Collector."

That said bill of sale so certified is a regular document issued from a custom-house of the United States proving said yacht to be American property; and said yacht has carried the same ever since the recording and certifying thereof as aforesaid.

Fifth. That since prior to the 1st day of July, 1891, and to the arrival as aforesaid of said vessel in the waters of the United
13 5 States, this libelant has been and now is a member of the Royal Mersey Yacht Club, and said vessel has been and now is enrolled among the yachts belonging to said yacht club; that said club is a regularly organized yacht club of a foreign nation, to wit, Great Britain, which extends, and at all times herein mentioned has extended, like privileges to the yachts of the United States, and by virtue of section 4216 of the Revised Statutes of the United States said yacht "Conqueror," at all times in this paragraph mentioned, has been and now is privileged to enter and leave any port of the United States, without entering or clearing at the custom-house thereof or paying tonnage tax.

14 Sixth. That on the 27th day of August, 1891, in the navigable waters of the United States, in the harbor of New York off Stapleton, within the jurisdiction of this court, J. Sloat Fassett, by his deputies, agents, and servants, illegally, wrongfully, and forcibly, without the consent and against the will of this libelant, took possession of said yacht and has ever since detained her in his possession and custody, and has deprived this libelant of the use and control thereof.

Seventh. That the said Fassett is and at the times in the last paragraph mentioned was the collector of customs of the United States
15 for the port of New York, and he took and kept and maintains possession of said yacht solely upon the claim that she was an article imported into the United States within the fair intendment of the customs revenue laws, and as such liable to duty; that the duties which accrued upon her importation were unpaid, and that he was entitled to take and keep her in safe custody till such duties should be paid or secured, in the manner provided by law for articles imported into the United States; that the said vessel was not seized under any claim of authority therefor given by any provision
16 6 of the laws of the United States relating to commerce and navigation, or of any law of the United States providing a penalty or forfeiture.

Eighth. That as this libelant is advised and verily believes, the said yacht is not an imported article, within the true intent and meaning of the tariff or customs revenue laws of the United States; and under and by virtue of those laws said Fassett, in his official capacity or otherwise, has no right or authority to take or keep possession thereof.

Ninth. That all and singular the premises are true and within the
17 admiralty and maritime jurisdiction of the United States and of this honorable court.

Whereupon the libelant prays that process in due form of law, according to the course of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle, apparel, and furniture, and that the said J. Sloat Fassett may be personally cited to appear and answer all the matters aforesaid; and that the said vessel, her tackle, apparel, and furniture, may be delivered to this libelant, and that the said J. Sloat Fassett may be

condemned to pay to the libelant his damages and costs in the premises; and that the libelant may have such other and further relief in 18
the premises as in law and justice he may be entitled to receive.

F. W. VANDERBILT.

ROOT & CLARKE,
Libelant's Proctors and Advocates.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick W. Vanderbilt, the above-named libelant, being duly sworn, says that he has read the foregoing libel and knows
7 the contents thereof, and that the same is true according to his information and belief. 19

F. W. VANDERBILT.

Sworn to before me this 31st day of August, 1891.

[SEAL.] JOHN F. KIRK,
Notary Public, Kings County, N. Y.

Cert. filed in N. Y. Co.

(Endorsed:) Libel. Filed Sept. 1, 1891. 20

District court of the United States for the southern district of New York.

Filed and recorded the 1st day of Sept., 1891.

Stipulation for libelant's costs.

Entered into pursuant to the rules and practices of this court.

Whereas, a libel was filed in this court on the first day of September, in the year of our Lord one thousand eight hundred and 21
ninety-one, by Frederick W. Vanderbilt against The Steam Yacht "Conqueror," etc., for the reasons and causes in the said libel mentioned, and praying that said the steam yacht "Conqueror" may be delivered to the libelant, etc., and the said libelant and Edward H. Wales, surety parties hereto, hereby consenting and agreeing, and that in case of default or contumacy on the part of the libelant or said surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

8 Now, therefore, it is hereby stipulated and agreed for the 22
benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is hereby, bound in the sum of two hundred and fifty dollars, conditioned that the libelant above named shall appear and answer to the cause and interrogatories, and shall pay all costs as shall be awarded against him by this court, or in case of appeal, by the appellate court.

F. W. VANDERBILT.
EDWARD H. WALES.

Taken and acknowledged this 1st day of September, 1891, before me.

[SEAL] JOHN F. KIRK, 23
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick W. Vanderbilt and Edward H. Wales, parties to the above stipulation, being duly sworn, do depose and say that they reside in the city of New York, and that they are severally worth the sum of five hundred dollars over and above all just debts and liabilities.

F. W. VANDERBILT.
24 EDWARD H. WALES.

Sworn to this first day of September, 1891, before me.

[SEAL.] JOHN F. KIRK,
Notary Public, Kings County, N. Y.

Cert. filed in N. Y. Co.

25 9 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas, a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York, on the 1st day of Sept., in the year of our Lord one thousand eight hundred and ninety-one, by Frederick W. Vanderbilt vs. The Steam Yacht "Conqueror," her tackle, &c., and against J. Sloat
26 [L. S.] Fassett, possession, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, her tackle, &c., may be cited in general and special to answer the premises, and all proceedings being had, that the said steam yacht or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be delivered to the libelant.

27 You are therefore hereby commanded to attach the said steam yacht vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be delivered to the libelant pursuant to the prayer of the said libel, that they be and appear before the said court to be held in and for the southern district of New York on the 15th day of Sept., 1891, at eleven o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction,
28 10 otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And we do hereby further empower, and strictly charge and command you, the said marshal, that you cite and admonish the said respondent, if he shall be found in your district, that he be and appear before the said district court on the 15th day of Sept., 1891, at the U. S. court rooms, in the city of York, then and there to answer the said libel, and to make his allegations in that behalf; and have you then and there this writ, with your return thereon.

Witness the Honorable Addison Brown, judge of said court, this 29
1st day of Sept., in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth.

SAMUEL H. LYMAN, *Clerk.*
ROOT & CLARKE,
Libelant's Proctors

(Endorsed:) Vol. 37. Southern district of New York, United States district court. Frederick W. Vanderbilt vs. The Steam Yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett. Rec'd from Collector by mail Sept. 3rd, 1891. 30

11 United States circuit court, southern district of New York. 31

NOTICE.—I have arrested the steam yacht "Conqueror," her tackle, etc., impleaded, &c., libeled by Frederick W. Vanderbilt, for possession. Process returnable and cause to be heard September 15, 1891, 11 a. m., in said court, post-office building, New York City. All persons interested must then present their claims, or be defaulted, and said vessel delivered up in pursuance of the said libel.

New York, Sept. 1, 1891.

JOHN W. JACOBUS,
U. S. Marshal. 32

ROOT & CLARKE,
Libelant's Proctors.

STATE OF NEW YORK,
City and County of New York, ss:

Thomas Mulhearn, of the city of New York, being duly sworn, says he is the chief clerk in the office of the Mail and Express, a daily paper printed and published in the city of New York, and that the notice, of which the annexed is a printed copy, has been regularly published in the said Mail and Express for twelve times successively, commencing on the 1st day of September, 1891. 33

THOMAS MULHEARN.

Sworn before me this 15th day of September, 1891.

WM. R. WORRALL,
Notary Public, No. 70, City and County of New York.

12 U. S. MARSHAL'S OFFICE, 34
SOUTHERN DISTRICT OF NEW YORK,
ROOM 56, 3D FLOOR, U. S. COURT AND P. O. BUILDING,
New York, September 2, 1891.

SIR: You will please to take notice that the steam yacht "Conqueror" (impleaded with J. Sloat Fassett), her tackle, etc., has been attached by me, at the suit of Frederick W. Vanderbilt for possession, and will remain in my custody until the claim is settled, or the said vessel is bonded.

Yours, etc.,
(Signed) JOHN W. JACOBUS, 35
U. S. Marshal Southern District N. Y.

TO THE CAPTAIN OR PERSON IN CHARGE OF SAID STEAM YACHT.

I do hereby certify, that upon the receipt of the annexed process, my deputy proceeded to execute the same, and on the 2nd day of September, 1891, found the within-named steam yacht "Conqueror" (her tackle, &c.), at anchor in New York Bay, off Stapleton, Staten Island, and served a notice of attachment of such yacht, a copy of
36 which notice is hereto annexed, marked A, upon Charles N. Unsworth, first officer of said yacht, the captain thereof being absent. On the 4th day of September inst., I caused the said notice of attachment to be affixed to the mainmast of said yacht, and every day since that day until the 11th day of September inst., my deputy went on board of said yacht, and at all times found an inspector of customs on board. On the day last above mentioned, on my deputy attempting to board said yacht, he was forbidden to do so by the inspector of customs, the latter claiming to be in charge thereof for the United States.

13 That after the receipt of said process, I caused to be pub-
37 lished the notice affixed to the proof of publication hereto annexed, marked B, and that said notice has been published every day since, as appears by said proof.

That the Government of the United States claim that there are duties payable on said vessel, and that she was at the time of issuing process herein, and that ever since has been in possession of the United States, and that the United States is entitled to hold her until such duties are paid, and I further return that the libel herein sets up such claim of the United States.

38 I further certify, that on the 2nd day of September, 1891, in the city of New York, in my district, I personally served the within process upon the within-named respondent, J. Sloat Fassett, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

JOHN W. JACOBUS,
U. S. Marshal.

39 NEW YORK, *September* 15, 1891.

40 14 District court of the United States for the southern district of New York.

FREDERICK W. VANDERBILT
against
YACHT "CONQUEROR," &C., and J. Sloat Fassett.

41 On the application of Root & Clarke, proctors for the libellant:
It is ordered, that an alias process for the attachment of said yacht, her tackle, &c., issue.
Dated New York, September 23, 1891.

CHAS. L. BENEDICT.

42 (Endorsed:) Order for alias process. Filed Sept. 24, 1891.

15 *Alias process issued under court's order, dated Sept. 23d,* 1891. 43

SOUTHERN DISTRICT OF NEW YORK, *ss.*

The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York, on the 1st day of September, in the year of our Lord one thousand
[L. S.] eight hundred and ninety-one, by Frederick W. Vanderbilt, 44
against The steam yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett. (Cause of possession, in which the libelant, as owner of said yacht, alleges that said Fassett, under a claim of official authority as collector of customs, has illegally and wrongfully deprived him of the possession of said yacht.)

For the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, 45
her tackle, &c.. may be cited, in general and special, to answer the premises, and all proceedings being had, that the said steam yacht or vessel, her tackle, &c., may, for the causes in the said libel mentioned, be delivered to the libelant.

You are therefore hereby commanded to attach the said steam yacht or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give due notice of thirteen days (a shorter time than fourteen days having
16 been directed by the judge of the court) to all persons claiming 46
the same, or knowing or having anything to say why the same should not be delivered to the libelant, pursuant to the prayer of the said libel, that they be and appear before the said court to be held in and for the southern district of New York on the 6th day of October next, at 11 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf.

Witness the Honorable Addison Brown, judge of said court, this 47
twenty-fourth day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth.

(Signed) SAMUEL H. LYMAN,
Clerk.

ROOT & CLARKE,
Libelant's Proctors.

In obedience to the within monition, I attached the steam yacht "Conqueror," her tackle, &c., therein described, on the 29th day of September, 1891, and have given due notice, in obedience to the annexed 48
order, to all persons claiming the same, that this court will, on the 6th day of October, inst. (if that day should be a day of jurisdiction; if not, on the next day of jurisdiction thereafter), proceed to the trial and

condemnation thereof, should no claim be interposed for the same. Proof of publication of notice hereto annexed.

J. W. JACOBUS,
U. S. Marshal.

Dated October 6th, 1891.

49 17 I hereby depute John E. Dowley to execute the within process.

JOHN W. JACOBUS,
U. S. Marshal, S. D., N. Y.

N. Y., Sept. 4, 1891.

(Endorsed:) Vol. 37, page 274. U. S. circuit court, southern district of New York. Frederick W. Vanderbilt against The steam yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett. Process in rem and personam returnable Oct. 6th, 1891. Root & Clarke, proctor sfor libelant. Let within process issue. Filed Sept.
50 23d, 1891. Charles L. Benedict.
51
52 18 I do hereby certify that upon the receipt of the annexed process my deputy proceeded to execute the same, and on the 2d day of September, 1891, found the within-named steam yacht "Conqueror" (her tackle, &c.), at anchor in New York Bay, off of Stapleton, Staten Island, and served a notice of attachment of such yacht, a copy of which notice is hereto annexed, marked A, upon Charles N. Unsworth, first officer of said yacht, the captain thereof being absent. On the 4th day of September, inst., I caused the said notice of attachment to be affixed to the mainmast of said yacht; and every day since that day until the 11th day of September, inst., my
53 deputy went on board of said yacht, and at all times found an inspector of customs on board. On the day last above mentioned, on my deputy attempting to board said yacht, he was forbidden to do so by the inspector of customs, the latter claiming to be in charge thereof for the United States.

That after the receipt of said process I caused to be published the notice affixed to the proof of publication hereto annexed, marked B, and that said notice has been published every day since, as appears by said proof.

That the Government of the United States claim that there are duties payable on said vessel, and that she was at the time of issuing
54 process herein, and that ever since has been in possession of the United States, and that the United States is entitled to hold her until such duties are paid; and I further return that the libel herein sets up such claim of the United States.

I further certify that on the 2nd day of September, 1891, in the city of New York, in my district, I personally served the within process upon the within-named respondent, J. Sloat Fassett, by exhibiting to him the within original, and at the same time leaving with him a copy thereof.

(Signed) JOHN W. JACOBUS,
U. S. Marshal.

NEW YORK, *Sept.* 15, 1891.

19 STATE OF NEW YORK, 55
City and County of New York, ss:

Thomas Mulhearn, of the city of New York, being duly sworn, says he is chief clerk in the office of the Mail and Express, a daily paper printed and published in the city of New York, and that the notice, of which the annexed is a printed copy, has been regularly published in the said Mail and Express in each week, for five times successively, commencing on the 30th day of September, 1891.

(Signed) THOMAS MULHEARN.

United States district court, southern district of New York. 56

NOTICE.—I have arrested the yacht "Conqueror," her tackle, &c., impleaded with J. Sloat Fassett, libeled by Frederick W. Vanderbilt for possession. Process returnable and cause to be heard October 6, 1891, at 11 a. m., in said court, United States court and post-office building, New York City. All persons interested must then present their claims or be defaulted, and said vessel condemned.

New York, September 30, 1891.

JOHN W. JACOBUS,
U. S. Marshal.

ROOT & CLARKE,
Libelant's Proctors.

Sworn before me this 5th day of October, 1891. 57

(Signed) ROBERT C. ALEXANDER,
Notary Public, City and County of New York.

20 At a stated term of the district court of the United States 58
of America for the southern district of New York, held at the United States court rooms in the city of New York on the 30th day of September, in the year of our Lord one thousand eight hundred and ninety-one.

Present, the Hon. Charles L. Benedict, district judge.

FREDERICK W. VANDERBILT } 59
vs.
THE YACHT "CONQUEROR," &C. }

On motion of Root & Clarke, proctors for the libelant, it is ordered that the notice for all persons to appear and intervene for their interest in the above-entitled cause be published by the marshal until the sixth day of October, 1891.

CHARLES L. BENEDICT.

A true copy. 60

SAML. H. LYMAN, *Clerk.*

61 21 United States district court, southern district of New York.

FREDERICK W. VANDERBILT
vs.
THE STEAM YACHT "CONQUEROR," her tackle, &c. } In admiralty.

62 STATE OF NEW YORK,
City and County of New York, ss:

I, Joseph J. Couch, special deputy collector of customs, and by law acting collector of customs of the port of New York in the absence of the collector for said port, so constituted under his hand and seal, being duly sworn, saith that the steam yacht "Conqueror," was on the 27th day of August, 1891, taken possession of and is now detained by me under authority of the revenue laws of the United States, and for the enforcement of the payment of the duties chargeable thereon, also by direction of the Secretary of the Treasury of the said United States, pursuant to his decisions construing the law
63 in this regard; that the said yacht has been continuously since the said date in my possession.

I further declare that I have not given permission to the United States marshal for this judicial district, his deputy, or to any person, to make seizure of said property, or to enter thereon for such purpose.

J. J. COUCH.

Sworn to and subscribed before me this 10th day of September, 1891.

[L. S.] THOS. B. MOORE,
Not. Public.

64 22 United States district court, southern district of New York.

FREDERICK W. VANDERBILT
vs.
THE YACHT "CONQUEROR," &C. } In admiralty.

65 I, Peter T. O'Neill, being duly sworn, saith, I am an inspector of customs; that on the second of September, 1891, about eight o'clock in the morning, I entered upon and took charge of the said steam yacht "Conqueror" (relieving Inspector Richard Barry), for and on the authority of the collector of customs for the port and collection district of New York, which said yacht was and has since been at anchor off Stapleton, Staten Island, in the harbor and port of New York aforesaid; that the said yacht, under the said authority, has been in my actual charge during the day since that date, and at night in charge of the night inspector of customs; that on that day, and
66 at day's intervals during the time aforesaid, a person who I afterwards learned was the United States marshal, came from the shore and boarded the said yacht, and at one of his visits in my absence, while the vessel was in charge of the night inspector—as he informed me—posted a notice on the vessel's mast, informing all concerned of the pendency of the libel aforesaid, which said notice was so posted

surreptitiously, or without my knowledge or any assent on my part; that on a subsequent visit the said deputy marshal, or person so representing himself, I informed him that I held the vessel in charge for and on behalf of the collector of customs of the port aforesaid, and would not recognize any authority in him in any respect with reference to the said vessel, unless by direction of my superior officer; that the said deputy did not take or exercise, or attempt to take or exercise, any direction, possession, or custody of the said vessel; that I remained on board with full, absolute custody of the same, while he was on board—which was but for a short interval at any time—and after his departure; that I have continued to hold said possession and custody as aforesaid, except at such times as I have been relieved by another officer of customs under the proper authority, so that at no time since the date aforesaid has the said vessel been out of the actual custody and control of an authorized officer of the customs, under and by virtue of the revenue laws of the United States.

I further saith, that I have in no sense recognized or assented to any possession or control of the said vessel by the United States marshal, his deputy, or any other person than the collector of customs of the port aforesaid.

PETER T. O'NEILL.

Sworn to and subscribed this 14th day of September, 1891.

[L. S.] WALTER R. EATON,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

United States district court, southern district of New York.

FREDERICK W. VANDERBILT, *vs.* THE YACHT "CONQUEROR." } In admiralty.

STATE AND COUNTY OF NEW YORK, *ss:*

I, Francis Hendricks, being sworn, saith that I am the collector of customs for the port and collection district of New York.

On the 1st of October, 1891, as the successor in office aforesaid of J. Sloat Fassett, I took possession of the steam yacht "Conqueror," lying in store under general order, in the Erie Basin, South Brooklyn, within the said collection district; I so took and now hold possession of said yacht, under and by authority of the revenue laws of the United States, for the payment of duties upon the same, as an article imported into the United States, the same not having been entered in pursuance of the provisions of any act regulating imports.

I further declare that I have not, nor has anyone in my behalf, nor to my knowledge, given permission to the United States marshal of this judicial district, or his deputy, or to any person, to enter upon the said yacht, save and excepting the duly authorized customs officer or inspector of customs, or to make seizure, or to take custody or control, in any manner, of the said yacht, or to do any act inconsistent

with my right and the right of the United States to absolute possession, for the payment of customs duties as aforesaid.

FRANCIS HENDRICKS.

Subscribed and sworn to before me this 6th day of October, 1891, at 4 p. m.

[L. S.]

J. GAUTIER, Jr.,
Noty. Public, N. Y. Co.

73 25 United States district court, southern district of New York.

FREDERICK W. VANDERBILT, *vs.* THE YACHT "CONQUEROR." } In admiralty.

STATE AND COUNTY OF NEW YORK, *ss:*

74 I, Joseph J. Couch, being duly sworn, saith that I was on the 27th of August, 1891, have been since continuously, and am now the special deputy collector of customs for the port and collection district of New York, so constituted in due form of law under the hands and seals, respectively, of J. Sloat Fassett, collector of customs for that collection district on that day and until the 1st October, 1891, and of Francis Hendricks, collector, as aforesaid, on the day last named and at the present time.

On the 27th of August, 1891, aforesaid, the steam yacht "Conqueror" was taken possession of by the said J. Sloat Fassett, collector
75 as aforesaid, under authority of the customs revenue laws of the United States, and further by the direction of the Secretary of the Treasury of the United States, the said yacht having been imported into the United States, and not having been entered in pursuance of any act regulating importation.

On the 1st of October aforesaid the possession of the said yacht devolved upon and was taken by the said Francis Hendricks, collector of customs, as the duly appointed and qualified successor of the said J. Sloat Fassett, and is now held by the said Francis Hendricks, as collector, under authority of the revenue laws of the United
76 26 States. At the time of taking possession of the said yacht as aforesaid, to wit, on the 27th of August, 1891, the same was lying at anchor off Stapleton, Staten Island, within the boundary of the county of Richmond, in the State of New York, within the jurisdiction of the port and collection district aforesaid, where she continued to lie at anchor on and during the 1st of September following, and until the 29th of September, 1891, at which last-named date, for greater security and pursuant to instructions of the Secretary of the Treasury, she was removed by the collector of the said port to the Erie Basin, South Brooklyn, in the said collection district, under the personal attendance, charge, and control for the collector aforesaid,
77 by the inspector of customs; such an officer remaining on board and in absolute control during such removal, at her arrival, and during her detention at her said place of harborage.

I further declare that the said yacht has been continuously, since the 27th of August, down to the present moment, and is at present in

the possession of the collector of customs aforesaid, and of the law regulating importation; that I have not, nor has anyone by my authority, or by the authority of the collector of customs, given possession to the United States marshal for this judicial district, his deputy, or to any person whomsoever, at any time to enter thereon, save and excepting the duly authorized customs officer or inspector, 78
or to make seizure, or to take custody or control in any manner of the said yacht, or to board the same for such purpose, or any other purpose, inconsistent with the possession and custody aforesaid, and with the right of the collector of this port and the right of the United States, to hold the same for the payment of customs duty as aforesaid.

J. J. COUCH.

Sworn to and subscribed before me this 6th day of October, 1891, at 4 p. m.

[SEAL.] J. GAUTIER, Jr.,
Notary Public, N. Y. Co.

27 STATE OF NEW YORK, 79
City and County of New York:

Peter T. O'Neill, being duly sworn, saith that he is an inspector of customs at the port of New York; that on the 29th of September, 1891, he was in charge of the yacht "Conqueror," stationed off Stapleton, Staten Island, for and under directions of the collector of customs of that port; that upon the said yacht being removed that day by direction of the said collector, and by a steam tug directed by an inspector of customs, he remained on board the said yacht and continued to remain in charge thereof after her removal to the Erie Basin, where she was tied up about half-past two o'clock, afternoon; that at ten minutes after four o'clock thereafter, two men appeared on the 80
side of the vessel, representing themselves as deputy United States marshals, and attempted to serve a paper which they said was for the purpose of attaching the yacht; that at this juncture deponent appeared at the gangway and attempted to prevent them coming aboard, laying his hand on the foremost; the other then jumped on board, and the first also, both against deponent's earnest protest and declaration that he held the vessel for the collector of the port, and under his instructions to resist any interference with his possession; that they persisted in remaining on board against deponent's remonstrance, and with such appearance of force as he was unable success- 81
fully to encounter; that he told them he should remain on board in charge, to which they offered no objection; that he accordingly so remained in charge until about 4.55 o'clock, afternoon of that day, when he was relieved by Night Inspector Kasmire, who in turn he relieved at half-past seven in the morning of the 30th of September, when he was temporarily relieved at a later hour for the purpose of making report at the custom house. He further saith that about four (p. m.) o'clock, on said 30th of September, he resumed his
28 charge of the said vessel; that each day, excepting Sunday, 82
and up to this morning since he has taken charge of the same at about seven o'clock in the forenoon, relieving at such hour the

night inspector, whom he found in charge and control, and on Sunday he was relieved by a day inspector on board. During the entire time he has been so in charge on board the said vessel no assertion of custody or control was made by the deputy marshal, nor was any attempt made by him or any other person to interfere with deponent's control of the yacht, further than the declaration at the beginning that the U. S. marshal was in possession, which deponent earnestly antagonized by the assertion of the collector's custody held through
83 him as the legally authorized customs officer.

PETER T. O'NEILL.

Sworn and subscribed this 6th day of October, 1891.

[SEAL.] WM. MASTEN,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

STATE OF NEW YORK,
City and County of New York:

I, Benjamin F. Kasmire, being sworn, saith that I am an inspector
84 of customs in the service of the United States at the port of New York. On the 29th of September, 1891, about 4 o'clock, afternoon, for and on behalf of the collector of customs for that port, and by proper official designation, I went on board and took charge of the steam yacht "Conqueror," lying in Erie Basin, South Brooklyn, thereby relieving the day inspector, Mr. Peter T. O'Neill, at or about six o'clock each alternate night, to wit, October 1st, 3d, and 5th. I also by the same authority and in the same capacity as night inspector of customs boarded the said yacht, thereby relieving the day
85 29 inspector, whom I found on board and in charge. I remained continuously so on board and in charge until about half-past seven in the morning of the following days, when I was relieved by the day inspector, who came aboard, taking my place. During the entire time mentioned I had absolute and entire control of the yacht and possession thereof as and for the collector of customs, and so considered that to be my relation to the vessel. During this time no assertion of custody, control, or possession was made by any marshal, deputy marshal, or other person, nor was any attempt or offer made by any such officer or person to interfere with my coming aboard, remaining there, or to interfere in any way with my charge and con-
86 trol, which was well known and understood by all persons about the vessel to be that of the collector of customs.

BENJ. F. KASMIRE,
Night Inspector of Customs.

Sworn to and subscribed before me this 6th day of October, 1891.

[SEAL.] C. H. HEYZER,
Notary Public, N. Y. Co.

STATE OF NEW YORK,
87 *City and County of New York, ss:*

I, Joseph Wallace, being sworn, saith that I am a United States inspector of customs at the port of New York. On the 30th of

September, 1891, by authority of the collector of customs at that port, at or about five o'clock and thirty minutes, afternoon, I went on board and took charge in his name of the steam yacht "Conqueror," lying in Erie Basin, South Brooklyn, thereby relieving Mr. Peter O'Neill, the day inspector, also on board and in charge, on each alternate day following, to wit, October 2nd and 4th, at or about
30 the same time in the afternoon and in the same capacity; I 88
likewise boarded and took charge of the said yacht, relieving also the day inspector, whom I found on board and in charge. I so remained on board and in charge continuously each night until the morning following the days aforesaid, and until I passed the charge of the vessel over to the day inspector who was designated and came on board to relieve me. During the entire time mentioned I had considered myself as having absolute and entire control and possession of the yacht as and for the collector of customs of the port aforesaid. During this time no assertion of custody or possession was made by any marshal, deputy marshal, or other person, nor was any 89
attempt or offer made by any such officer or person to interfere with my coming on board, remaining there, or with any charge and control, which was well known and understood by all persons about the vessel to be that of the collector of customs.

JOSEPH WALLACE,
Night Inspector.

Sworn to and subscribed before me this 6th of October, 1891.
[SEAL.] C. H. HEYZER,
Notary Public, N. Y. Co.

STATE OF NEW YORK, 90
City and County of New York, ss:

I, Kenneth S. Johnson, being sworn, saith that I am an inspector of customs in the United States customs service. On the 31st of August, 1891, as inspector aforesaid, under authority of the collector of customs at New York, I took charge on board of the steam yacht "Conqueror," at or about five o'clock in the afternoon, relieving Inspector Richard H. Barry. I remained on board so in
31 charge until seven o'clock of the morning of the 1st of September, 1891. During this time the said vessel's position at 91
anchor was off Stapleton, Staten Island, about one thousand feet from shore, to the westerly of the main channel of the Bay of New York, at that point and between such channel and the shore of Staten Island aforesaid.

KENNETH S. JOHNSON.

Sworn to before me this 2d of October, 1891.
[SEAL.] WATER R. EATON,
Notary Public, Kings County.

Certificate filed in N. Y. Co. 92

STATE OF NEW YORK,
City and County of New York, ss:

I, Richard H. Barry, being sworn, saith that I am an inspector of customs in the customs service of the United States; on the 1st of

September, 1891, at or about 7 o'clock, morning, as such inspector, I took charge on board of the steam yacht "Conqueror," under and by authority of the collector of customs at the port of New York, thereby relieving another officer. I remained so in charge, continuously on board, until about five o'clock, afternoon, of that day, when
93 I was relieved by R. T. Chartier, an inspector of customs. During the time aforesaid the said vessel's position at anchor was off Stapleton, Staten Island, about one thousand feet from shore, to the west of the main channel of New York Bay, at that point and between such channel and the shore of Staten Island aforesaid.

RICHARD H. BARRY.

Sworn to before me this 2nd of October, 1891.

[SEAL.] WALTER R. EATON,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

94 32 STATE OF NEW YORK,
City and County of New York, ss:

I, R. T. Chartier, being duly sworn, saith that I am an inspector of customs in the United States customs revenue service. On the 1st of September, 1891, at or about five o'clock in the afternoon, as inspector aforesaid, I took charge on board of the steam yacht "Conqueror," under authority of the collector of customs for the port of New York, thereby relieving Richard H. Barry. I remained on board so in charge until about seven or eight o'clock of the morning of September 2nd, 1891, when I was relieved by Inspector Peter T.
95 O'Neill. During the time aforesaid the said vessel was at anchor off Stapleton, Staten Island, about one thousand feet from the shore, to the westwardly of the main channel of the Bay of New York, at that point and between such channel and the shore of Staten Island aforesaid.

RAY T. CHARTIER.

Sworn to before me this 2nd day of October, 1891.

[SEAL.] WALTER R. EATON,
Notary Public, Kings County.

96 Certificate filed in N. Y. Co.

97 33 U. S. district court, southern district of New York.

FREDERICK W. VANDERBILT
vs.
THE YACHT "CONQUEROR." } In admiralty.

STATE OF NEW YORK,
City and County of New York:

98 I, Henry E. Olley, being sworn, saith that I am an inspector of customs in the customs service of the United States. As such inspector I took charge of the yacht "Conqueror," by official designation and under authority of the collector of customs for the port of New York, at or about seven o'clock this morning, the 6th of Octo-

ber, 1891, thereby relieving the night inspector, Mr. Kasmire, whom I found in charge on board. I remained on board in charge as aforesaid, until twelve o'clock noon to-day, when I was relieved by Day Inspector Peter T. O'Neill, who took my place. During the time I so remained I had absolute charge and control of the yacht, and possession thereof as and for the collector of customs, without question 99
or interference by any marshal, deputy marshal, or other person. I had no official information or intimation that a deputy marshal, or other person, was on board, claiming or asserting custody or possession of the vessel, and during the time no one attempted or offered to interfere with my charge thereof.

H. E. OLLEY.

Sworn to and subscribed before me this 6th of October, 1891.

[SEAL.] R. H. FRENCH,
Notary Public.

34 U. S. district court, southern district of New York. 100

FREDERICK W. VANDERBILT
vs.
THE YACHT "CONQUEROR." } In admiralty.

STATE OF NEW YORK,
City and County of New York: 101

I, Thomas Kenny, being sworn, saith that I am a United States inspector of customs at the port of New York. As such inspector I took charge of the yacht "Conqueror," lying in the Erie Basin, South Brooklyn, under official designation and by authority of the collector for the said port, at or about seven o'clock in the morning of Sunday, the 4th of October, 1891, thereby relieving Night Inspector Kasmire, whom I found on board in charge. I remained on board continuously in charge aforesaid, until about six o'clock in the evening, when I was relieved by a night inspector, Mr. Wallace, who took my place on board the vessel. During the said time I so 102
remained on board I had absolute control and charge of the yacht, also possession thereof for the collector of customs, without question or interference by any marshal, deputy, or other person. There was no assertion by any person of possession of the vessel other than myself, and no attempt or offer to disturb or interfere with me.

THOMAS KENNY.

Sworn to and subscribed before me this 6th of October, 1891.

[SEAL.] R. H. FRENCH,
Notary Public.

103 35 District court of the United States, southern district of New York.

FREDERICK W. VANDERBILT, LIBELANT,
vs.
THE YACHT "CONQUEROR" AND J. SLOAT FASSETT, respondents.

104

The marshal having returned the alias process issued under Judge Benedict's order, dated September 23, 1891, that he had attached said yacht;

And the district attorney, appearing specially for the collector of the port, having filed ten affidavits traversing the return of the marshal;

And it appearing to the court to be doubtful whether the marshal's attachment is sufficient for the purposes of this suit.

Now, therefore, on motion of Root & Clarke, proctors for the libelant, it is

Ordered, that another process issue for the attachment of said
105 yacht, in the same form as said alias process (except as to the time of notice to be given) returnable October 13, 1891, at eleven o'clock in the forenoon, and that the marshal execute the same by taking full and exclusive possession of said yacht. It is further

Ordered, that a copy of this order be annexed to such process, and that notice to all persons to appear and intervene for their interest in the above-entitled cause be published by the marshal until said 13th day of October, 1891.

Dated New York, October 8th, 1891.

ADDISON BROWN.

106 36 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America, to the marshal of the southern district of New York, greeting:

Whereas a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York, on the 1st day of September, in the year of our Lord one [L. S.] thousand eight hundred and ninety-one, by Frederick W. Vanderbilt against the steam yacht "Conquerer," her tackle,
107 &c., and against J. Sloat Fassett (cause of possession, in which the libelant as owner of said yacht, alleges that said Fassett under a claim of official authority as collector of customs, has illegally and wrongfully deprived him of the possession of said yacht), for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, her tackle, &c., may be cited, in general and special, to answer the premises, and all proceedings being had, that the said steam yacht or vessel,
108 her tackle, &c., may, for the causes in the said libel mentioned, be delivered to the libelant, you are therefore hereby commanded to attach the said steam yacht or vessel, her tackle, &c., and to detain

the same in your custody, until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be delivered to the libelant, pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and
37 for the southern district of New York, on the 13th day of 109
October, inst., at 11 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf.

Witness the Honorable Addison Brown, judge of said court, this eighth day of October, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth.

SAMUEL H. LYMAN, *Clerk.* 110

ROOT & CLARKE,
Libelant's Proctors.

(Endorsed:) Vol. 37, page 274. Southern district of New York, United States district court. Frederick W. Vanderbilt against The Steam Yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett. Process in rem and personam, returnable Oct. 13th, 1891. Root & Clarke, proctors for libelant. Filed Oct. 13th, 1891. 111

38 United States district court, southern district of New York. 112

NOTICE.—I have arrested the yacht "Conqueror," her tackle, &c., impleaded with J. Sloat Fassett, libeled by Frederick W. Vanderbilt, for possession. Process returnable and cause to be heard October 13, 1891, at 11 a. m., in said court, United States court and post-office building, New York City. All persons interested must then present their claims or be defaulted, and said vessel condemned.

New York, October 8, 1891.

JOHN W. JACOBUS,
U. S. Marshal.

ROOT & CLARKE, 113
Libelant's Proctors.

STATE OF NEW YORK,
City and County of New York, ss:

Thomas Mulhearn, of the city of New York, being duly sworn, says he is chief clerk in the office of the Mail and Express, a daily paper printed and published in the city of New York; and that the notice, of which the annexed is a printed copy, has been regularly published in the said Mail and Express for four times successively, commencing on the eighth day of October, 1891. 114

THOMAS MULHEARN.

Sworn before me this 12th day of October, 1891.

WM. R. WORRALL,
Notary Public, No. 70, City and County of New York.

115 39 I do hereby certify that, on the 8th day of October, 1891, in obedience to the annexed process, in the waters of Kings County, N. Y, and within the admiralty jurisdiction of this court, I attached the within-named yacht "Conqueror," her tackle, &c., by taking full and exclusive possession thereof, as required by the annexed order, and I do further certify that the same is now and has been continuously since said attachment in my exclusive possession, under process issued to me herein.

I do further certify that I have given due notice, as appears by the proof of publication hereto annexed, to all persons claiming said yacht, her tackle, &c., that this court will, on the 13th day of Octo-
116 ber inst. (if that be a day of jurisdiction, if not, on the next day of jurisdiction thereafter) proceed to the trial and condemnation thereof, should no claim be interposed for the same.

JOHN W. JACOBUS,
U. S. Marshal.

117 New York, October 13th, 1891.

118 40 United States district court, southern district of New York.

FREDERICK W. VANDERBILT
vs.
THE YACHT "CONQUEROR." } In admiralty.

STATE OF NEW YORK,
119 *City and County of New York:*

I, Peter T. O'Neill, being sworn, saith, that I am an inspector of customs in the United States Revenue Service at the port of New York. On the 8th of October, 1891, as inspector aforesaid, and by authority of the collector of customs for that port, I was in the charge and control of the Yacht "Conqueror," on board the same as the custodian of the collector aforesaid. On that day, at or about three o'clock in the afternoon, five men, representing themselves as United States deputy marshals, forced themselves on board the said yacht then lying in the Erie Basin, South Brooklyn, and so in my custody. They insisted
120 upon taking possession of the vessel, whereupon I informed them that I was in possession of the same for the collector of customs for the port of New York, and that I could not and would not recognize them as having any right to come on board, which they had done against my protest; and moreover, that I would maintain possession of the vessel for my superior officer, under whose authority I was holding the same. After some parleying they said they would put me off the vessel, which they proceeded to do, laying hands upon me for the purpose and accomplishing the same with an exhibition of
41 force which I was unable to resist. They thus led me off the
121 vessel outside the rail and to the shore, against my protest, which I repeatedly made.

PETER T. O'NEILL.

Sworn to and subscribed before me this 9th day of October, 1891.
[SEAL.] WALTER R. EATON,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

United States district court, southern district of New York.

FREDERICK W. VANDERBILT *vs.* THE YACHT "CONQUEROR" AND J. SLOAT FASSETT.	In admiralty.

SIR: You will please enter my appearance as proctor for J. Sloat Fassett, in personam, and as late collector of customs at the port of New York, on behalf of the United States, and for Francis Hendricks, as collector of customs at the port of New York, claimant, on behalf of the United States.

Dated October 13th, 1891.

EDW. MITCHELL,
U. S. Attorney.

To SAMUEL H. LYMAN, Esq., *Clerk.*

(Endorsed:) In admiralty. U. S. district court, southern district of New York. Frederick W. Vanderbilt versus The Yacht "Conqueror," and J. Sloat Fassett. Appearance. Edward Mitchell, United States attorney, proctor for J. Sloat Fassett, and others. Filed Oct. 13, '91. H. C. P.

42 *To the honorable the district court of the United States, in and for the southern district of New York:*

The claim, answer, and exceptions of J. Sloat Fassett, late collector of customs at the port of New York, for and on behalf of the United States, by Edward Mitchell, district attorney of the United States of America for the southern district of New York, intervening for the interest and possession of the said United States in the said vessel or steam yacht "Conqueror," her tackle, apparel, and furniture, to the libel of the said Frederick W. Vanderbilt, alleges as follows:

1. That the said J. Sloat Fassett, lately as collector of customs at the port of New York, on behalf of the United States, claimed the said vessel or steam yacht "Conqueror," her tackle, apparel, and furniture, for the enforcement of the payment of lawful duties thereon, under the revenue laws of the United States, which have not been paid, and which became due upon the arrival of said yacht in the port of New York, from a foreign country, on or about the 6th day of July, 1891.

2. That he is ignorant of the matters alleged in the 2nd, 3rd, 4th, and 5th articles of said libel contained.

3. He denies that he took possession of said yacht within the jurisdiction of this court, but on the contrary alleges that before and at the time of filing said libel, and until the 29th day of September last, said yacht was in the waters of Richmond County, and within the exclusive territorial jurisdiction of the eastern district of New York, and not within the territorial jurisdiction of the southern district of New York, and that he took possession of said yacht on behalf of the

United States, lawfully within the said waters of Richmond
43 County; and he denies that he illegally or wrongfully took possession of said yacht as alleged in the 6th article of said
127 libel.

4. He admits the matters alleged in the 1st and 7th articles of said libel.

5. He further alleges, that as he is advised, the said yacht is an article imported from a foreign country and subject to duties, under the revenue laws of the United States.

6. That in pursuance of an order of the Secretary of the Treasury, and under and by virtue of the revenue laws of the United States, he,
128 said Fassett, as collector of customs at the port of New York, on behalf of the United States, and not otherwise, took possession of said yacht "Conqueror," on the 27th day of August, 1891, in the port of New York, for the enforcement of the payment of duties thereon as aforesaid, and not otherwise; and the collector of customs, at the port of New York, has been ever since said date, and is now in the lawful possession thereof, and the same has not been since said date, and is not now in the lawful possession or custody of any other person or persons, officer or officers.

7. That this honorable court has no jurisdiction of the matters
129 contained in said libel, the same not being a civil cause of admiralty and maritime jurisdiction, the possession of the collector of the port of New York, as aforesaid, on behalf of the United States, being possession thereof provided for by the revenue laws of the United States, and the said yacht being properly taken or detained by the collector of the port, under authority of the revenue laws of the United States, and in custody of the law.

Wherefore, the said attorney, on behalf of the United States, prays that said libel be dismissed with costs; that this honorable
130 44 court decree restitution of the possession of said yacht to the collector of customs at the port of New York, and otherwise right and justice administer in the premises.

Oct. 15, 1891.

EDWD. MITCHELL,
U. S. Attorney.

(Endorsed:) In admiralty. U. S. district court, southern district of New York. Frederick W. Vanderbilt versus The yacht "Conqueror," &c. Claim, answer, and exceptions to libel. Edward Mitchell, United States attorney, proctor for J. Sloat Fassett, as col-
131 lector. Filed Oct. 15, '91.

To the honorable the district court of the United States, in and for the southern district of New York:

The answer and exceptions of J. Sloat Fassett, in personam, by Edward Mitchell, district attorney of the United States of America for the southern district of New York, and proctor for said J. Sloat Fassett, to the libel of Frederick W. Vanderbilt, owner of the vessel
132 or steam yacht "Conqueror," alleges as follows:

1. He is ignorant of the matters alleged in the 2nd, 3rd, 4th, and 5th articles of said libel contained.

2. He denies that he took possession of said yacht within the jurisdiction of this court, but on the contrary he alleges that before and at the time of filing said libel, and until the 29th day of September last, said yacht was in the waters of Richmond County, and not within the territorial jurisdiction of this court.

45 3. He admits the matters alleged in the 1st and 7th articles 133 of said libel.

4. He denies that he took possession of said yacht wrongfully, as alleged in the 6th article of said libel.

5. He alleges that all and singular his acts relating to the taking and detaining of said yacht were done by him in his official capacity as collector of customs at the port of New York, in the performance of his public duty, under instructions of the Secretary of the Treasury, and under and by virtue of the revenue laws of the United States, and on behalf of the United States, and not otherwise. 134

Wherefore, the said J. Sloat Fassett, by his said proctor, Edward Mitchell, United States attorney, prays that said libel be dismissed with costs, and that this honorable court may otherwise right and justice administer in the premises.

October 15, 1891.

EDWD. MITCHELL,
U. S. Attorney and Proctor for J. Sloat Fassett.

(Endorsed:) In admiralty. U. S. district court, southern district of New York. Frederick W. Vanderbilt versus the yacht "Con- 135 queror." Answer and exceptions of J. Sloat Fassett, in personam. Edward Mitchell, United States attorney, proctor for J. Sloat Fassett, in personam. Filed Oct. 15, '91.

46 *To the honorable the district court of the United States, in and* 136 *for the southern district of New York:*

The claim, answer, and exceptions of Francis Hendricks, collector of customs at the port of New York, for and on behalf of the United States, by Edward Mitchell, district attorney of the United States of America for the southern district of New York, intervening for the interest and possession of the said United States in the said vessel or steam yacht "Conqueror," her tackle, apparel, and furniture, to the libel of the said Frederick W. Vanderbilt, alleges as follows:

1. That the said Francis Hendricks, as collector of customs at the 137 port of New York, on behalf of the United States, now claims the said vessel or steam yacht "Conqueror," her tackle, apparel, and furniture, for the enforcement of the payment of lawful duties thereon, under the revenue laws of the United States, which have not been paid, and which became due upon the arrival of said yacht in the port of New York from a foreign country, on or about the 6th day of July, 1891.

2. He alleges that said yacht was not within the jurisdiction of this court at the time of filing the libel herein, and denies that said 138 yacht was then within said jurisdiction, as alleged in the 6th article of said libel.

3. He further alleges that, as he is advised, the said yacht is an article imported from a foreign country and subject to duties, under the revenue laws of the United States.

4. That in pursuance of an order of the Secretary of the Treasury, and under and by virtue of the revenue laws of the United States, J. Sloat Fassett, as collector of customs at the port of New York, on behalf of the United States, and not otherwise,

139 47 took possession of said yacht "Conqueror" on the 27th day of August, 1891, in the port of New York, for the enforcement of the payment of duties thereon as aforesaid, and not otherwise, and the collector of customs at the port of New York, from August 27th, 1891, until the 8th day of October, 1891, was in the actual possession thereof on behalf of the United States, and between said last-mentioned dates the same was not in the actual possession or custody of any other person or persons, officer or officers. On the 8th day of October, 1891, five men, representing themselves to be deputy marshals, by physical force took actual possession of said

140 yacht, in the Erie Basin, in South Brooklyn, where said yacht has been placed in store, under general order, by the collector of customs at the port of New York, and forcibly removed the collector's officer therefrom, and forcibly took away the said yacht from the actual possession and custody of the United States.

5. That notwithstanding the exercise of physical force, as aforesaid, the collector of customs at the port of New York claims that he is, on behalf of the United States, in lawful possession of said yacht, and for public purposes as aforesaid, and is entitled of right to the actual possession and custody thereof.

141 6. That this honorable court has no jurisdiction of the matters contained in said libel, the same not being a civil cause of admiralty and maritime jurisdiction; the possession of the collector of the port of New York, as aforesaid, on behalf of the United States, being possession thereof provided for by the revenue laws of the United States, and the said yacht being property taken or detained by the collector of the port, under authority of the revenue laws of the United States, and in custody of the law.

142 48 Wherefore, the said attorney, on behalf of the United States, prays that said libel be dismissed with costs; that this honorable court will be pleased to decree a restitution of the said yacht to him, as collector of customs at the port of New York, on behalf of the United States, and otherwise right and justice to administer in the premises.

Oct. 15, 1891.

EDWD. MITCHELL,
U. S. Attorney.

On October 15th, 1891, in open court, it was ordered by Judge

143 Addison Brown that testimony in this case be taken before Samuel H. Lyman, clerk of the court, for use before the court.

(Endorsed:) In admiralty. U. S. circuit court, southern district of New York. Frederick W. Vanderbilt versus The Yacht "Con-

queror," &c. Claim, answer, and exceptions to libel. Edward Mitchell, United States attorney, proctor for Francis Hendricks. Filed Oct. 15, 91. 144

49 District court of the United States for the southern district 145
of New York.

FREDERICK W. VANDERBILT,
vs.
THE YACHT "CONQUEROR" AND J. SLOAT FASSETT.

NEW YORK, *January 20th*, 1892. 146

Testimony taken before the clerk of the court for use before the court:

Appearances: Mr. Clarke and Mr. Root for the libelant; Mr. Mitchell and Mr. Platt for the claimant, and for J. Sloat Fassett personally.

FREDERICK W. VANDERBILT, being duly sworn, testified:

Direct examination by Mr. CLARKE:

Q. You are the libelant in this case? 147
A. Yes.
Q. You are a native born American citizen?
A. Yes.
Q. You are the owner of the yacht "Conqueror"?
A. Yes.
Q. Has anybody else any interest as owner in it?
A. Nobody.
Q. When did you become the owner?
A. About May, 1891.
Q. From whom did you purchase her?
A. Mr. Bailey.
Q. Look at the paper I show you and state whether that is the bill of sale?
A. Yes; that is.
50 Q. Is the description of the yacht in the bill of sale cor- 148
rect?
A. Perfect.
Q. Does the consideration price, 15,550 pounds sterling, express the price paid for this vessel?
A. Yes.
Mr. CLARKE. I ask to have this paper marked for identification. (Marked Ex. 1, for identification.)
Q. Where was the yacht delivered to you?
A. It was delivered at Hull, England.
Q. What did you do with her before bringing her to the United 149
States?
A. Cruised about the coast of England, Scotland, Ireland, and up to Norway and Holland, and back to England again.
Q. Then I understand you sent her to the United States in charge of her master?

A. Yes.
Q. Her master is J. E. Wood?
A. Mr. J. E. Wood.
Q. What use is this vessel designed for?
A. Pleasure only.
Q. Have you ever put her to any other use?
A. No.
Q. Are you a member of the Royal Mersey Yacht Club of England?
A. Yes.
Q. When did you become a member?
150 A. In June, 1891.
Q. Have you any papers received from the secretary at that time?
A. Yes.
Q. Of your becoming a member?
A. Yes.
Q. Please produce them.
A. (Produces the papers.) Those are the papers.
Q. One of the papers that you produce is a notice of election dated June 17, 1891?
A. Yes.
Mr. CLARKE. I ask to have that marked for identification. (Marked Ex. 2, for identification.)
151 51 Q. This notice, Ex. 2, requests that the entrance fee, one pound one shilling, and the annual subscription, one pound one shilling, be paid to the treasurer. Did you pay that?
A. Yes.
Q. The notice also says that the club buttons and flags may be had by members upon application. Did you get them?
A. I got the flags. I did not ask for the buttons.
Q. You did not ask for the buttons?
A. No.
Q. One of the other documents produced by you as received from the secretary at the time of your election, is a blue pamphlet, endorsed "Laws of the Royal Mersey Yacht Club, instituted July, 1844."
152 Mr. CLARKE. I ask to have that marked for identification. (Marked Ex. 3, for identification.)
Q. Another document produced by you was received from the secretary at the time of your becoming a member of the club, and is a white pamphlet, endorsed "List of Members and Yachts of the Royal Mersey Yacht Club," corrected May, 1880?
A. Yes, sir.
(The paper is marked Exhibit 4, for identification.)
153 Q. In Exhibit 4, a list of members and yachts, on page 21, appears the name "Vanderbilt—W. F.," and in the next column U. S. In the next column S. S. Next column "Conqueror," and in the next column 526, all written in ink. Was that written there when you received this pamphlet, Exhibit 4, from the secretary?
A. Yes, sir.
Q. You received this pamphlet, Exhibit 4, and the blue pamphlet, Exhibit 3, at the same time?

A. I think at the same time, as near as I can recollect.
Q. It came in this envelope?
A. I think they all came together.
52 Q. Have you received any other official notices from this club since your election? 154
A. There is one I received this morning. (Producing paper.)
Q. You received this one you now produce this morning?
A. By mail this morning.
Q. That is a request for the payment of the annual dues for the year ending the 31st of December, 1892, and a notice of the annual regatta and the annual meeting, is it?
A. Yes, sir.
(The paper is marked Exhibit 5, for identification of this date.)
Q. State whether or not the Royal Mersey Yacht Club is a regularly organized yacht club of Great Britain? 155
A. Yes, it is.
Q. Have you ever gone into English ports on an American yacht, that is, a yacht built in the United States?
A. No.
Q. You know nothing as to the privileges of American yachts in English ports of your own knowledge?
A. Not of my own knowledge.

Cross-examination by Mr. PLATT:

Q. Mr. Vanderbilt, when did I understand you to say that you were elected a member of this Royal Mersey Yacht Club?
A. It is the same date as the notice; I think it is the 17th day of June. 156
Q. June 16th, 1891?
A. The date of the notice.

By Mr. CLARKE:

Q. The notice is dated the 17th, and says you were elected yesterday. That would make it June 16th?
A. Yes, sir.

By Mr. PLATT:

Q. When did you buy this yacht?
A. I bought it sometime before that. I really could not say what date. I think it is in the bill of sale.
Q. The bill of sale is dated the 20th day of May?
A. That is correct.
53 Q. Was Mr. Bailey, from whom you purchased this yacht, a member of the Royal Mersey Yacht Club? 157
A. I could not say.
Q. You say you received a club flag about when?
A. I think I will have to refer that to Mr. Wood.
Q. As I understand, you did not come over in this yacht from the other side at this time?
A. No, sir.
Q. When did you first see this club flag?
A. The one that I have?

Q. Yes, sir.

A. I could not say the time. I first saw it on board the yacht sometime.

Q. Abroad?

A. I could not say; I have forgotten.

158 Q. Did the yacht carry that flag abroad?

A. No.

Q. What flag did you carry after the purchase?

A. The New York Yacht Club ensign.

Q. What national flag did you carry abroad?

A. The yacht ensign.

Q. Did you apply to the collector for this endorsement upon the bill of sale?

A. That was applied for by Mr. Wood, the sailing master.

Q. The master of the yacht?

A. Yes, sir.

Q. He applied to the collector by your direction? Did he make this application by your request or direction?

A. Yes, sir.

159 Q. What flag did you carry after the arrival of the vessel here. What national flag?

A. The yacht ensign of the New York Yacht Club.

Q. Did you ever see the British flag hoisted on your yacht abroad?

A. Not while I owned her.

Q. Nor the American flag, after her arrival here?

A. The American, yes; the yacht ensign.

Q. How many passengers would this yacht accommodate?

A. The number of rooms?

Q. How many could she carry comfortably?

A. Well, I suppose she could carry about ten, comfortably.

Q. Has ten state rooms?

A. Nine or ten.

160 54 Q. How many could she carry on her decks comfortably?

A. None at all, comfortably. I don't think it would be very comfortable on deck.

Q. She is large enough to carry merchandise?

A. I hardly know how to answer that.

Q. How large is she.

A. The tonnage is on the bill.

Q. Her net tonnage is 219 and $\frac{21}{100}$. How much merchandise is she able to carry?

A. I don't think she would be able to carry any. Her hold is very small, simply the usual stores necessary. The rest is all state-rooms and for the crew. I don't think she could carry any merchandise.

Q. Where did you first see this yacht after your arrival in this country?

161 A. I saw her pass my house at Newport on her way to Halifax.

Q. Was she flying the club flag at that time?

A. The New York Club ensign.

Re-direct examination by Mr. CLARKE:

Q. When you say that the vessel could not be used for carrying merchandise, do you mean to say she is not capable of being used for the transportation of merchandise?

A. I mean about the room. If she was used as a yacht, all the room would be taken up by the people on board of her and the crew. And the hold would carry the stores. That is what I meant to convey by that statement.

Q. You mean her use as a yacht would be inconsistent with her use 162
for the transportation of merchandise?

A. Yes, sir; that is what I meant.

Q. You may state whether after you purchased the yacht and put her into commission, you cruised with her at all in the home waters of the Royal Mersey Yacht Club?

A. I put her in commission at Southampton.

Q. Did you after that cruise with her at all in the home waters?

A. I cruised in the south of England.

Q. You did not go up to Liverpool after that?

A. Not to Liverpool.

55 FRANCIS W. J. HURST, a witness called on behalf of the 163
libelant, being duly sworn, testified as follows:

Direct examination by Mr. CLARKE:

Q. What is your business?

A. Steamship agent.

Q. Of what line?

A. The National line.

Q. And have you lived in England?

A. Some years.

Q. Are you acquainted with the Royal Mersey Yacht Club?

A. I was, 32 years.

Q. You may state whether or not that is the regularly organized yacht club of Great Britain.

A. It is one of the leading clubs in Great Britain; the Royal
Mersey. 164

Q. Have you entered the ports of England on American yachts? I mean by American yacht, American built.

A. No.

Captain WILLIAM DOLE VAN WYKE, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Direct examination by Mr. CLARKE:

Q. What is your business?

A. Master mariner; sailor.

Q. How long?

A. 44 years.

Q. Have you ever been master of an American yacht, cruising abroad?

A. I have. 165

Q. How many times, on how many different yachts?

A. On one yacht, five years.

Q. Have you ever entered on an American-built yacht the ports of England?

A. I have.

Q. Can you state what privileges are given to American-built yachts in the ports of England as to the matter of entering and clearing at the English custom-house and paying tonnage taxes?

A. As far as I know, I have been five years in the south of England, and we never had to pay one farthing entrance or clearing, either entering or clearing at the custom-house.

166 56 Q. You never entered or cleared at the custom-house at which they charged tonnage taxes?

A. No, sir.

Cross-examination by Mr. PLATT:

Q. Coming from a foreign port, is it usual to enter a yacht to show a bill of health?

A. They are generally boarded by the health officers, who inspect your papers.

Mr. CLARKE. I offer to read as evidence in this case the deposition of J. Weaver Webb, in the case of The United States agst. The
167 Schooner "Miranda," pending in the district court of the United States for the southern district of New York:

"J. B. Weaver Webb, being duly sworn, says: My occupation is that of a naval officer, resident in New York City. I am an English subject, and was for a long time measurer of the Yacht Racing Association of England. I am familiar with the English laws relating to yachts and yachting. Under the laws of England an American yacht proceeding from port to port in England is not obliged to enter or
168 clear at the custom-house, or to pay any tonnage tax. She is obliged to pay dock dues in artificial harbors the same as English yachts, I believe. In coming from a foreign port it is usual to enter the yacht and show the bill of health. No tonnage dues or anything else is payable then.

"(Signed) J. B. WEAVER WEBB.

"Sworn to before me this 28th day of July, 1889.

"THOMAS ALEXANDER,
"*U. S. Commissioner.*"

169 57 Mr. Clarke then called Collector Hendricks and Mr. Robert Hunter appeared for him.

ROBERT HUNTER, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

Direct examination by Mr. CLARKE:

Q. What is your business?

A. Clerk in the custom-house.

Q. Have you brought the papers that Mr. Hendricks, the collector, was subpœnaed to produce?

A. Yes, sir.

Q. Have you brought the report and manifest of the steam yacht "Conqueror," dated July 6th, 1891?

A. I have. 170

Q. You produce report and manifest by Master J. E. Wood, of the yacht "Conqueror," from Halifax, July 6th, 1891?

A. Yes, sir.

Q. To which is attached by mucilage the oath on entering the "Conqueror?"

A. Yes, sir.

Q. Verified July 2nd, 1891, and amendments verified July 11, 1891, by Mr. Wood?

A. Yes, sir.

Q. I notice on the back of the oath an endorsement, "Collector's fees, $2.50; surveyor's fees, 67 cents; tonnage duty, exempt; pleasure vessel, H. O., $5.00," making in all $8.17.

Q. Were those fees paid on the entry?

A. Yes, sir. 171

Q. I notice also on the back of an endorsement, "Light money under section 4225 R. S., S. 8,508 and 8,160 on 238 tons, at 50 cents, $119. July 11, 1891, John K. Gunner, D. C.," showing that light money was levied on this yacht on coming into the port?

A. Yes, sir.

Q. Does it show that light money was paid?

A. Yes, sir.

Q. There is also an entry on the back of the entry, certifying to refunding the light money, per Treasury instructions of July 21, 1891; statement issued September, 1891; amount of excess, $9.50.

A. Yes, sir.

58 Q. That shows that of the amount of $119, $9.50 have 172 been refunded?

A. Yes, sir.

Mr. CLARKE. I offer this report and the entry and the oath in evidence.

(Received and marked Libelant's Exhibit A, of this date.)

Q. You were also subpœnaed to produce the record of the direction to the surveyor to measure the yacht "Conqueror," on or about July 26, 1891, or a copy.

(Paper produced by witness.)

Q. You produce a copy of the sub-deputy collector's order to the 173 surveyor, dated July 10th, 1891.

A. Yes, sir.

(The copy produced by the witness is offered in evidence and marked Libelant's Exhibit B, of this date.)

Q. You were also requested to produce the surveyor's report of his survey of the yacht "Conqueror."

A. Yes, sir.

Q. The paper you produced is dated July 10, 1891?

A. Yes, sir.

Q. This is the original that you produce?

A. That is the original.

174 Q. The next is a certificate of the surveyor's office, that the measurement amounts to $28.50?

A. Yes, sir.

Q. Were they paid?

A. I suppose they were.

Q. Is there any check there that indicates it?

A. I think there is.

Q. You think the check there indicates that the fees were paid?

A. Yes, sir.

Mr. CLARKE. I offer this in evidence.

(Received and marked Libelant's Exhibit C, of this date.)

175 59 Q. You also were subpœnaed to produce the original instructions of the Secretary of the Treasury, dated August 21st, 1891, directing the collector of the port of New York to take the necessary steps for the appraisement of the "Conqueror" for duty, and the collection and assessment of duty according to law?

A. Yes, sir.

Q. You produce a copy of that?

A. Yes, sir; that is a copy.

Mr. CLARKE. I offer this copy in evidence.

(Received and marked Libelant's Exhibit D, of this date.)

176 Q. You were also instructed to produce the collector's instructions to the surveyor, dated on or about the 27th of August, 1891, directing the surveyor, without delay, to place a sufficient number of officers on board the yacht to secure her safe custody.

(Witness produces paper.)

Q. Is this a copy?

A. Yes, sir.

(The paper is offered in evidence and marked Libelant's Exhibit E, of this date.)

Q. You were also subpœnaed to produce a record of the order of

177 the surveyor to his subordinates to take possession of the yacht "Conqueror" on or about August 27th, 1891?

A. Yes, sir.

(Paper produced.)

Q. This is a copy?

A. Yes, sir.

(The paper is offered in evidence and marked Libelant's Exhibit F, of this date.)

Q. You were also subpœnaed to produce the report of the collector of customs of New York to the Treasury Department,

178 60 as to the liability of the steam yacht "Conqueror" to pay duty as an imported article under the import tariff law, dated on or about August 1st, 1891?

A. Yes, sir.

(Mr. Clarke offers the paper in evidence.

Mr. Mitchell objects to it.

The paper is marked, for identification, G, of this date.)

Q. Have you got the Department letter of the 24th of July, referred to in this letter?

A. No, sir.

Q. You haven't got that here?
A. It was not called for in this subpœna.
Mr. CLARKE. Please also send me a copy of the letter of the 24th 179
of July, recited in the collector's report.

J. E. WOOD, a witness called on behalf of the libelant, being duly sworn, testifies as follows:

Direct examination by Mr. CLARKE:

Q. You are the master of the yacht "Conqueror?"
A. I am.
Q. And have been since Mr. Vanderbilt purchased her in May, 1891?
A. Yes, sir; I joined her in April. I have been the only master 180
attached to her since he purchased her.
Q. What was done with the yacht after the purchase and before coming to this continent?
A. Some repairs were made in Liverpool, and Mr. Vanderbilt then used her cruising in England, Scotland, Norway, and the Continent.
Q. At what port on this continent did you first touch?
A. Halifax, Nova Scotia.
Q. From there where did you go?
A. To New York.
Q. Arrived about the 6th of July?
A. About the 5th or 6th of July.
61 Q. Did you report your arrival at the custom house? 181
A. I did.
Q. Did you present the reports and manifest that were produced by the prior witness to the collector?
A. I did.
Q. And paid fees of $8.17?
A. Yes, sir.
Q. At the time of presentation?
A. Yes, sir.
Q. And made the oaths?
A. Yes, sir.
Q. And the corrections to the oath on the 11th of July?
A. Yes, sir.
Mr. CLARKE. I offer in evidence this certified copy of the manifest and oath. (Marked Libelant's Exhibit H, of this date.) 182
Q. Did the collector levy light money upon the yacht?
A. Yes, sir; light money or light duty, I think it is called.
Q. Look at the papers I now show you, and state whether they are the original receipts you received for the fees of $8.17, and the light money, $119?
A. They are.
Mr. CLARKE. I offer them in evidence.
(Received and marked Libelant's Exhibit J, of this date.)
Q. Did you also present to the collector the bill of sale of the 183
yacht?
A. I did.

Q. For certification?

A. Yes, sir.

Q. The bill of sale, produced by Mr. Vanderbilt, and marked Exhibit 1, for identification?

A. Yes, sir.

Q. Did you obtain a certificate upon the vessel dated the 13th of July?

A. Yes, sir.

Mr. CLARKE. I offer in evidence in place of the original document, which is the document of the vessel, certified copy from the collector's office, with all the endorsements.

184 62 (Received and marked Libelant's Exhibit 1, of this date.)

Q. Since receiving the bill of sale back in that certified condition from the collector, the yacht "Conqueror" has carried that bill of sale ever since as its document?

A. Yes, sir; always.

Q. What was done with the yacht after entering her at the custom house in this way about the 6th of July, 1891?

A. There was some necessary work that was done on the yacht, and then she took a cruise to St. John's, New Brunswick.

Q. When did she come back?

A. She came back, I think, about the 23rd or so of July. I don't remember just exactly.

185 Q. To what port?

A. To Newport.

Q. When did she come back to New York?

A. I think the following day. I don't remember when she came back to New York. It was sometime after that when she came to New York.

Q. She came from Newport to New York?

A. I don't remember when. It was some days at least. I remember now that she cruised considerably before coming here—before coming to New York. I don't remember the date.

Q. How long did she continue under your control?

A. Until the 27th, I think, of August.

Q. And then what happened?

A. She was taken possession of by the custom house officers.

186 Q. And where was that?

A. Lying off Stapleton, Staten Island.

Q. Was she in navigable waters at the time?

A. Yes, sir.

Q. And in the harbor of New York?

A. Yes, sir.

Q. These two papers [showing witness papers], are they carried by the yacht in addition to the bill of sale?

A. They are.

Q. And were received by you from the prior master?

A. From the party who had charge of her.

187 63 Q. When you took possession in England?

A. Yes, sir.

(Two Lloyd certificates are offered in evidence by libelant's counsel, and marked Exhibits 2 and 3, of this date.)

Adjourned to January 21, 1892, at 11 o'clock a. m.

NEW YORK, *January* 21, 1892.

Met pursuant to adjournment. Present, Mr. Clarke, Mr. Mitchell, 188
and Mr. Platt.

Continuation of the examination of JOSEPH E. WOOD.

By Mr. PLATT:

Q. Captain, what flag did the "Conqueror" carry when she came over?

A. The American ensign and New York Yacht Club flag, and Mr. Vanderbilt's private signal.

Q. Did you have any national flag aboard?

A. English national flag; none other. 189

Q. And the American flag?

A. Yes, sir; the American flag; the American national ensign as well as the yacht ensign; the American national ensign.

Q. When did you first fly the American flag?

A. When she went into commission in Southampton.

Q. About what date?

A. About the 15th of May, more or less. I think on the 15th or thereabouts.

Q. Did you fly the British flag at any time after she went into commission?

A. Never.

64 Q. Or the Mersey club flag? 190

A. Never; never had occasion to fly it, never being in the waters or in commission of the Mersey club.

By Mr. CLARKE:

Q. Never what?

A. Never being in the home waters of the Royal Mersey Yacht Club, of course we never flew it. We always fly the New York Yacht Club flag, except, or in the waters of some other yacht club to which Mr. Vanderbilt belongs; all other occasions, fly the New York Yacht Club ensign.

By Mr. PLATT:

Q. This vessel belongs to the New York Yacht Club, does she? 191

A. She belongs to the New York Yacht Club. Mr. Vanderbilt is a member of the club; carries the vessel with it.

Q. And because of that membership you carried the American flag and New York Yacht Club flag?

A. We carried the American flag on the warrant of the endorsement of the bill of sale by the American consul at Liverpool.

Q. That is after you got over here?

A. No; before the American consul's endorsement was made over there; that entitled us to fly it abroad, and we came here. We needed the same thing done here in New York to enable us to fly it here.

Q. Is that endorsement on the bill of sale? 192

A. Yes, sir; it is on the bill of sale.

Q. Is that here?

Mr. CLARKE. You have the original, captain.

The WITNESS. I did not bring it down.

Q. About how many people did you bring over with you on board the yacht?

A. The ship's crew; about 25 of the ship's company.

Q. You carried those comfortably?

A. Oh, yes.

193 65 Q. What was her carrying capacity, or what is her carrying capacity?

A. Of passengers and crew?

Q. Yes.

A. She would carry about 25 or 26 of her crew, and say eight or ten passengers comfortably.

Q. Were you present when the yacht was first anchored off Stapleton?

A. I was.

Q. That was in August some time?

A. Yes, sir; that was in August; 27th of August.

Q. August, 1891?

A. 1891.

Q. Did you anchor her there?

A. I did.

Q. And did she remain at the same anchorage until removed to the Erie Basin afterwards?

194 A. She did.

Q. Will you describe her anchorage in reference to its location, as to whether she was eastward or westward of the middle channel of the bay and harbor of New York?

A. West of the main channel.

Q. West and south?

A. It would be west and north, would it not; the channel runs up about north—southwest and northeast; so being on the side of it, it would be west and north.

Q. Are you pretty well acquainted with the waters of the harbor of New York?

A. I am.

Q. And the location of the waters of Richmond County?

A. Yes; more or less.

195 Q. Was this vessel anchored in the waters of Richmond County, to the west of the middle of the main channel?

A. She was.

Q. Now, did you examine this yacht before she was purchased by Mr. Vanderbilt?

A. I did not.

Q. You examined her afterwards, I suppose; went over her and looked over her?

A. After joining her, first, I made myself familiar with her.

Q. Will you tell us the materials of which she was made and manufactured?

A. Iron and wood, I thing principally; probably some steel.

Q. Copper?

A. No copper.

66 Q. Iron, steel, and wood? 196

A. Iron, steel, and wood.

Q. And which was the component material of her chief value; the metal or the wood?

A. The metal.

Q. Is the hull iron?

A. Iron, with a wooden deck, of course.

Q. Were you present when this vessel—the yacht—was moved to the Erie Basin?

A. I was.

Q. Did you go with her?

A. I did.

Q. Were you on board of the yacht from the time of her anchorage up to the time that she got into Erie Basin, more or less?

A. More or less. I wasn't on board continually, but I was there every day, more or less. 197

Q. You had charge of her in the interests of the owner?

A. Of the owner, yes, sir; as far as safety was concerned.

Q. As far as taking care of her and the safety of the vessel was concerned?

A. To a certain extent; I can not say I had full charge of her safety, because I then could not have moved her or done anything without the consent of the custom-house; had it been necessary for her safety to move her, I couldn't do so.

By Mr. CLARKE:

Q. Without the consent of whom?

A. The consent of the officer in charge—custom-house officer. 198

By Mr. PLATT:

Q. Otherwise than that, you looked after the vessel?

A. So far as we were permitted to.

Q. Except as to that, were you ever denied the privilege of taking care of her and looking after her?

A. No occasion of care ever arose that was necessary for the officer to interfere, until we wished to move her.

Q. How long had she been at that anchorage before the
67 custom officers—I think you said about the 27th of August 199
they first came aboard—how long had she been there previous to that time?

A. I think we had anchored there only a few hours before the seizure. It was either on the same day or the day previous; I forget now which.

By Mr. CLARKE:

Q. Captain, you know where Redhook is?

A. About; yes.

Q. Do you know where Nutten Island, Bedlow's Island, Bucking Island, and the Oyster Islands are?

A. Bedlow's Island; the Nutten Island I do not remember by the name. I probably know it; may know it by some other name; the
200 Oyster Islands I do not know.

Q. Do you know the Oyster Islands?

A. Not by that name.

Q. Do you know Bucking Island?

A. No; I do not by that name.

Q. You know Bedlow's Island?

A. Yes.

Q. State whether or not the place where the yacht was lying when the officers took possession of her was on waters south of a line running across the North River from Redhook, so as to include Bedlow's Island, Bucking Island, Nutten Island, and the Oyster Islands, to the west bounds of the State of New York.

A. Yes, sir.

Q. It was south of that?

A. Yes, sir.

201 Mr. CLARKE. I offer in evidence printed copy of petition, rule and return to rule of the proceedings in the Supreme Court of the United States, October term, 1891, No. 10, Original, ex parte, in the matter of J. Sloat Fassett, petitioner. (Marked Libelant's Exhibit K, of this date.)

Mr. CLARKE. I offer certified copy of the opinion of the Supreme Court in the same matter. (Marked Libelant's Exhibit L, of this date.)

202 68 Mr. CLARKE. I offer certified copy of the Supreme Court's order in the same matter, denying Collector Fassett's petition for prohibition. (Marked Libelant's Exhibit M.)

Mr. CLARKE. As evidence of the matters litigated in the Supreme Court in that matter, I offer the Solicitor-General's brief for the petitioner. (Marked Libelant's Exhibit N, of this date.)

203 Mr. CLARKE. Also the district attorney's memorandum, submitted by the Solicitor-General. (Marked Libelant's Exhibit O, of this date.)

Mr. CLARKE. Also the brief submitted in behalf of the libelant in the cause, in opposition to Collector Fassett's petition. (Marked Libelant's Exhibit P, of this date.)

204 Mr. CLARKE. I offer in evidence a copy of articles 93, 94, 95, 96, and 97 of the General Regulations in the Customs and Navigation Laws, issued by Secretary Folger in 1884; the copy is contained on pages 21 to 23 of the libelant's Supreme Court brief. (Marked Libelant's Exhibit Q, of this date.)

It is stipulated and agreed between the counsel that the signing of the depositions by the witnesses be waived.

205 69 JOSEPH W. CONGDON, called as a witness on behalf of the claimants, being duly sworn, testified as follows:

Direct examination by counsel for claimants.

By Mr. PLATT:

Q. Captain, what is your occupation?

A. Mariner.

Q. Are you in the revenue service of the United States?

A. Captain in the revenue service of the United States.

Q. Are you familiar with the waters of the harbor of New York and the surrounding waters?

A. Quite familiar; yes. 206

Q. Do you recollect visiting the steam yacht "Conqueror" on or about September 25th, 1891?

A. I do.

Q. For the purpose of locating her position?

A. I do; yes, sir.

Q. And did you at that time locate her position?

A. I did; I have the chart here, if you wish to see it.

Q. (Handing witness paper.) Now, will you please state what her position was at that time?

A. This is right.

Q. Will you read it? You can make that your answer.

A. "U. S. revenue steamer 'Manhattan,' port of New York, September 25, 1891. This is to certify that I visited the steam yacht 207
'Conqueror' this day and located her position by cross bearings as follows: Port Lafayette bearing SE. ½ S. Statue of Liberty bearing N. NE. Plotted on the chart brings the Merritt Wrecking Company's building at Stapleton, Staten Island, to bear SW. by W. ½ W. Distance about 700 yards; bearings magnetic. The width of the bay at this part is about twenty-nine hundred yards. The yacht "Conqueror" lies to the south and west of the middle of the main ship channel. I have the chart here with the bearings on, if that will be of any service.

70 Q. Please produce that. 208

A. (Producing chart). Right in where those lines cross [indicating] I placed her.

Q. Were you in charge of the anchorage grounds at that time?

A. I am, sir.

Mr. PLATT. Perhaps we had better put the chart in evidence.

It is agreed that at the time of the collector's taking possession of the yacht she lay on the waters in the county of Richmond, lying south of the bounds of the county of New York.

(No cross-examination.) 209

Mr. CLARKE. I offer in evidence certified copy of the surveyor's certificate of admeasurement of the "Conqueror," together with the statement of fees exacted for the admeasurement. (Marked in evidence Libelant's Exhibit C, of this date.)

Mr. CLARKE. I also offer certified copy of the Treasury Department's letter to the collector of customs of New York, dated July 24th, 1891, and the reply of the collector, dated August 1st, 1891. (Marked in evidence Libelant's Exhibit G, of this date.) 210

It is agreed that counsel may put in copies of the Royal Mersey Yacht Club papers that were marked for identification Exhibits 2, 3, 4, and 5.

71 Mr. PLATT. I offer in evidence letter to the collector of customs of New York, from the Secretary of the Treasury, dated September 25th, 1891. (Marked Claimants' Exhibit 1, of this date.) 211

Mr. PLATT. I offer in evidence telegram from Secretary of the Treasury to collector of customs, New York, dated September 28, 1891, directing the yacht to be transferred to Erie Basin. (Marked
212 Claimants' Exhibit 2, of this date.)

Mr. PLATT. I offer in evidence letter from Deputy Collector Dudley F. Phelps to the surveyor of the port, dated September 29th, 1891, directing the transfer of vessel to Erie Basin. (Marked Claimants' Exhibit 3, of this date.)

Mr. PLATT. I offer letter from Special Deputy Collector Couch and naval officer to surveyor of the port, dated September 29, 1891,
213 placing this yacht in store under general order, at Erie Basin. (Marked Claimants' Exhibit 4, of this date.)

Mr. PLATT. I offer in evidence section 4, chapter 2, title 1, of the Revised Statutes of the State of New York, found in Banks & Bros., 6th edition, volume 1, page 184: "The county of Richmond shall contain the islands called Staten Island, Shooter's Island, and the islands of meadow on the west side of Staten Island, and all
214 72 the waters and lands under water of this State around the same, situate to the southward and westward of the middle of the main channel of the bay and harbor of New York, as far as the bounds of this State shall extend."

And section 5: "The county of New York shall contain the islands called Manhattan Island, Great Barn Island, Little Barn Island, Manning's Island, Nutten Island, Bedlow's Island, Bucking Island, and the Oyster Islands; and all the land under water within the fol-
215 lowing bounds: Beginning at Spuyten Duyvel Creek, where the same empties itself into the Hudson River on the Westchester side thereof, to the East River or sound; then to cross over to Nassau, or Long Island, to low water mark there, including Great Barn Island, Little Barn Island, and Manning's Island; thence along Nassau or Long Island shore, at low water mark, to the south side of the Redhook; thence across the North River so as to include Nutten Island, Bedlow's Island, Bucking Island, and the Oyster Islands to the west
216 bounds of the State; then along the west bounds of the State until it comes directly opposite to the first mentioned creek, and then to the place where the said boundaries began."

Mr. CLARKE. I offer from the same volume, section 7, of the same title, of the same chapter, of the same part of the Revised Statutes, as follows: "The counties of Kings, Richmond, and New York shall, for the purpose of serving all process, civil or criminal, have
217 73 concurrent jurisdiction on the waters in the counties of Kings and Richmond lying south of the bounds of the county of New York."

Mr. PLATT. I offer in evidence the record of the U. S. district court, southern district of New York, from the clerk's office, in the case of M. H. Gregory et al. against the bark Margaretta for possession; vessel attached May 10, 1884; libel dismissed June 7, 1884, for want of jurisdiction, on the ground that the vessel was attached
218 in the waters of Richmond County; also the decision of Judge Brown. (Objected to as incompetent, irrelevant, and immaterial.)

WEBSTER ELMES, called as a witness on behalf of the claimants, being duly sworn, testified as follows:

Direct examination by counsel for claimants.

By Mr. PLATT:

Q. Mr. Elmes, are you in the employ of the Government at the 219
custom-house?

A. Yes, sir.

Q. And have been for how long?

A. About a year last August.

Q. Prior to that you were in the Government service at Washington?

A. At Washington; yes.

Q. Do you know when Mr. J. Sloat Fassett retired from the office of collector of the port?

A. First of October, 1891.

Q. And his successor?

A. Assumed duties on that day.

Q. Having been previously sworn in?

74 A. I do not know that as matter of fact; I only understood 220
that he was sworn in two or three days before that.

Q. But he assumed the duties on the first day of October?

A. First day of October, officially.

Q. Are you acquainted with the facts connected with the yacht "Conqueror"?

A. Yes, sir; to a large extent.

Q. And the collector's action in reference to it?

A. Yes, sir.

Q. Can you tell what day the "Conqueror" was removed from her anchorage in the waters of Richmond County to the Erie Basin?

A. 29th of September, 1891.

No cross-examination. 221
222

75 LIBELANT'S EXHIBIT 1. 223

S. H. L.

I, Joel B. Erhardt, collector of customs for the port of New York, in the State of New York, in the United States of America, do hereby certify that the within bill of sale, bearing date of May 8, 1891, of the foreign-built (British) yacht "Conqueror," length 182 6/10 feet, breadth 24 8/10 feet, depth 13 5/10 feet; that she has a figurehead and elliptic stern, one deck, and two masts; that G. W. Lyons, surveyor, has certified that she measures 237 81/100 tons, as follows:

Capacity under tonnage deck	346.04	tons.	
Break, aft	2.17	"	
House, forward	17.14	"	224
" aft	4.45	"	
Chart house, amid	2.11	"	
	371.91	"	gross.

Prop. power..... 134.12
Crew space 5/100 .... 18.59
——— 152.71

219.20 net tonnage.

Sold and transferred by W. S. Bailey to Frederick W. Vanderbilt, is in the form and substance valid and effective in law, and has been duly recorded in my office, and the said Frederick W. Vanderbilt is a citizen of the United States.

As witness my hand and seal this 13th day of July, in the year of our Lord 1891.

225 [SEAL.] THOMAS. J. DUNN,
Deputy Collector.

Received for record July 10, 1891—12 o'clock.
(Signed) JOHN P. BEVINE,
Fees, 50 cents, paid Aug. 29, 1891. *Clerk.*

PORT OF NEW YORK, COLLECTOR'S OFFICE,
August 29, 1891.

I hereby certify the above to be a true copy of the original on file in this office.

[SEAL.] JOHN H. GUNNER,
Deputy Collector.

Official numbers: 95,786.	Name of ship: "Conqueror."	No., date, and port of registry: 19—1889—Hull.

NO., DATE, AND PORT OF PREVIOUS REGISTRY (IF ANY).

Whether British or foreign built: British.	Whether sailing or steam ship, and if a steamship, how propelled: Steam screw.	Where built: Port Glasgow.	When built: 1889.	Name and address of builders: Russell & Co., Port Glasgow.

Number of decks.....Two.	Head.....Demi-woman	Length from forepart of stern under bowsprit to the aft side of the head of sternpost.....	188	05
Number of masts....Two.	Framework and description of vessel.....Iron.	Length at quarter of depth from top of weather deck at side amidships to bottom of keel.....		
Rigged.....Schooner.		Main breadth to outside of plank.....	24	6
	Number of bulkheads.....	Depth in hole from tonnage deck to ceiling at midships.....	13	5
Stern.....Square.		Depth in hole from upper deck to ceiling at midships in the case of three decks and up.....	—	—
	Number of water-ballast tanks and their capacity in tons.....	Depth from top of beam amidships to top of keel.....	—	—
Built.....Clencher.		Depth from top of deck at side amidships to bottom of keel.....	—	—
Galleries.....None.		Round of beam.....	—	—
		Length of engine room (if any).....	35	8

PARTICULARS OF DISPLACEMENT.

Total to quarter the depth from weather deck at side amidships to bottom of keel.....tons.
Ditto per inch immersion, at same depth..... tons.

PARTICULARS OF ENGINES (IF ANY).

No. of Engines.	Description.	Whether British or foreign made.	When made.	Name and address of makers.	No. of diam. of cylinder.	Length of stroke.	N. H. P. I. H. P. Speed of ship.
One set.	Engine—Triple expansion, direct acting, vertical inverted cylinder. Boilers—Number. Iron or steel. Pressure when loaded.	British.	Engines, 1888. Boilers, 1888.	Engines—Wm. King & Co., Glasgow. Boilers—Wm. King & Co., Glasgow.	Three. 15½ ins. 24 " 40 "	33 inches.	90

PARTICULARS OF TONNAGE.

Gross tonnage.	No. of tons.		Deductions allowed.	No. of tons.
Under tonnage deck	364.79			
Closed-in spaces above tonnage deck, if any			On account of space required for propelling power	179.46
Space or spaces between deck			On account of spaces occupied by seamen or apprentices and appropriated to their use, and kept free from goods or stores of every kind, not being the personal property of the crew. These spaces on the following, viz:	
Poop				
Forecastle				
Round house	17.85	Cubic metres.		
Other closed-in spaces, if any, as follows: Fore and aft, break decks	3.54		Spaces under the upper deck, aft end, and a space in the fore cabin	32.13
Gross tonnage	386.18	1092.89		
Deductions, as per contra	211.59	598.80		
Registered tonnage	174.59	494.09	Total deductions	211.59

229 77 I, Walter Samuel Bailey, of the town or borough of Kingston-upon-Hull, shipowner, in consideration of the sum of fifteen thousand five hundred and fifty pounds sterling, paid to me by Frederick W. Vanderbilt, of New York, U. S. A., the receipt whereof is hereby acknowledged, transfer sixty-four 64/64 shares in the ship above particularly described, and in her boats, guns, ammunition, small arms and appurtenances, to the said Frederick W. Vanderbilt.

Further, the said Walter Samuel Bailey, for myself and my heirs, covenant with the said Frederick W. Vanderbilt and his assigns that 230 I have power to transfer in manner aforesaid the premises hereinbefore expressed to be transferred, and that the same are free from incumbrances.

In witness whereof I have hereunto subscribed my name and affixed my seal this seventh day of May, one thousand eight hundred and ninety-one.

Executed by the above-named Walter Samuel Bailey in presence of Chas. Weddall.

231 12 Mark Lane, London. W. S. BAILEY. [L. S.]

78 UNITED STATES CONSULATE,

232 *Liverpool, May* 8, 1891.

I, Thomas H. Sherman, consul of the United States for the port of Liverpool, do hereby certify that the within bill of sale, bearing date the 7th day of May, 1891, of the steam yacht "Conqueror," described as follows:

Tonnage:		No. of tons.
Under tonnage deck		364.79
Roundhouses		17.85
Fore and aft, break deck		3.54
		386.18
Less deductions:		
On account of space required for propelling	179.46	
Spaces under upper deck, aft end and a space in the fore cabin	32.16	
		211.59
233 Registered tonnage		174.59

Measurements:	Feet.	Tenths.
Length from forepart of stern under the bowsprit to the aft side of head of the steam post	188	05
Main breadth to outside of plank	24	6
Depth in hold from tonnage deck to ceiling, midships	13	5
Length of engine room	35	8

Sold and transferred by W. S. Bailey to Frederick W. Vanderbilt, has been proven satisfactorily to me to have been duly executed by the subscribing party; and I further certify that Frederick W. Vanderbilt therein mentioned, as purchaser of the vessel, is a citizen of the United States.

As witness my hand and the seal of the consulate this eighth day of May, 1891.

234 [SEAL.] THOS. H. SHERMAN,
U. S. Consul.

UNITED STATES CONSULATE,
Liverpool, May 8th, 1891.

I, the undersigned, Thos. H. Sherman, consul of the United States of America at the city of Liverpool, England, do hereby certify that on the day of the date hereof, personally came and appeared St. Clare J. Byrne, consulting naval architect of respectability, doing business in this city, and declared that he negotiated on behalf of Frederick W. Vanderbilt, the purchase of the steam yacht "Conqueror," and the signature, W. S. Bailey, to the bill of sale hereunto annexed is genuine, and is that of the seller of said yacht. I further certify that the said bill of sale is executed in accordance with the laws of England.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year above written.

[SEAL.] THOS. H. SHERMAN,
U. S. Consul.

79 LIBELANT'S EXHIBIT 2. 235

Lloyds register of British & foreign shipping.

[SEAL.]

No. 2 WHITE LION COURT, CORNHILL, E. C.,
London, 17th April, 1889.

No. 219.

These are to certify that the iron screw schooner yacht "Conqueror," of Hull, 174 59/100 reg., 386 18/100 gross tons, 526 Y. M. built by 236 Russell & Co., and launched 20th February, 1889, has been surveyed at Port Glasgow by the surveyors to this society, and reported to be on the 5th April, 1889, in a good and efficient state; and that she has been classed and entered in the yacht register book of this society with the character 100 A 1, subject to being submitted to periodical survey and being kept in good condition.

Built under special survey and the notation ✠ affixed.

Anchors and chains proved at a machine, under the superintendence of the society, and record made of "Lloyds A. & C. P." Two decks. Four bulkheads. Cemented. 237

Witness my hand:

THOS. B. WALKER,
Chairman of the Committees of Classification.

A. G. DRYHURST,
Asst. Secretary. Charge.

80 LIBELANT'S EXHIBIT 3. 238

Lloyds register of British & foreign shipping.

[SEAL.]

No. 2 WHITE LION COURT, CORNHILL, E. C.,
London, April 26th, 1889.

No. 48.

These are to certify that the engine and boilers of the iron screw schooner yacht "Conqueror," of Hull, 174 59/100 reg., 386 18/100 gross, 526 Y. M. tons, have been surveyed at Glasgow by the engi- 239

neer surveyors to this society, and reported to be on the 13th March, 1889, in good, efficient, and safe working condition, and that the record ✠ Lloyds M. C., 389 (Lloyd's machinery certificate), has been made in the yacht register book accordingly.

Particulars of engines.—Description, triple expansion, inverted; when made, 1889; name & address of makers, W. King & Co.,
240 Glasgow; diameter of cylinders, 15½", 24" & 40; length of stroke, 33"; steam pressure working, 160 lbs.; registered horse power, 30.

Witness my hand:

THOS. B. WALKER,
Chairman of the Committees of Classification.

A. G. DRYHURST,
Asst. Secretary. Charge.

241 81 LIBELANT'S EXHIBIT 2.

ROYAL MERSEY YACHT CLUB,
CLUB HOUSE, 9 MERSEY STREET,
Birkenhead, June 17, 1891.

SIR: I beg leave to inform you, that at a meeting of the Royal Mersey Club, held yesterday, you were elected a member, on the nomination of St. Clare Bryne, esq., seconded by Sir W. B. Forwood.

And it is requested that the entrance fee, £1 1s., and the annual
242 subscription, £1 1s., be paid to the hon. treasurer, Mr. R. B. Crowe, 13 King street, Liverpool, or to

Your obedient servant,

JAMES GLADSTONE,
Hon. Secretary.

To F. W. VANDERBILT, Esq.

N. B.—The club buttons and flags may be had by members on application to me at the clubhouse.

243

244 82 LIBELANT'S EXHIBIT 3.

Laws of the Royal Mersey Yacht Club. Instituted July, 1844. *Liverpool: C. Tinling and Co., printers, Victoria street.* 1885.

245 Officers of the club, 1885: Commodore, lieutenant-colonel, D. Gamble; vice-commodore, David MacIver, esq., M. P.; rear-commodore, Sir W. B. Forwood, J. P.; treasurer, Arthur Bald,
246 esq.; cupbearer, S. G. Sinclair, esq.; auditors, J. M. Hannay, esq., C. H. Beloe, esq.; secretary, Capt. James Gladstone.

Clubhouse, Mersey street, Birkenhead, near Liverpool.

247 83 *Copy of the letter from the secretary of state for the home department, containing the grant of Her Majesty for the title of "Royal."*

WHITEHALL, 23*rd September*, 1844.

SIR: I have the honor to submit to the Queen the request of the Mersey Yacht Club to be called "Royal," and I have the satisfaction

to inform you that Her Majesty has been graciously pleased to consent to its being called "The Royal Mersey Yacht Club."

I have the honor to be, sir, your obedient servant, 248

(Signed) JAMES GRAHAM.

HENRY MELLING, Esq., *Liverpool.*

Copy of the letter from Sir. J. Barrow, the secretary of the lord's commissioners of the admiralty, granting the club flag.

ADMIRALTY, *24th September*, 1844.

SIR: In reply to your letter of the 12th inst., I am commanded 249 by my lord's commissioners of the admiralty to transmit to you herewith a warrant, authorizing the vessels belonging to the Mersey Yacht Club to wear the blue ensign of Her Majesty's fleet, with the distinctive marks of the club.

I am, sir, your most obedient servant,

J. BARROW.

HENRY MELLING, Esq.,
Secretary of the Mersey Yacht Club.

84 *Copy of the Warrant.* 250

LOCUS SIGILLI. By the commissioners for executing the office of lord high admiral of the United Kingdom of Great Britain and Ireland:

Whereas, we deem it expedient that the vessels belonging to the Mersey Yacht Club shall be permitted to wear the blue ensign of Her Majesty's fleet on board their respective vessels, with the distinctive marks of the club, we do, therefore, by virtue of the power and authority vested in us, hereby warrant and authorize the blue ensign of Her Majesty's fleet, with the distinctive marks of the club, to be worn on board the respective vessels belonging to the Mersey 251 Yacht Club accordingly.

Given under our hands and seal of the office of admiralty, the 24th September, 1845.

(Signed) W. H. GAGE.
W. GORDON.

By command of their lordships.

(Signed) JOHN BARROW.

LAWS. 252

I.

The objects of the club being the encouragement of yacht building and yacht sailing on the river Mersey, the funds of the club (with the exception of the funds arising from life members' subscriptions, which must be invested in Liverpool corporation stock, dock bonds, or other permanent investments) shall be appropriated (after paying the necessary and current expenses) to providing prizes to be sailed for by yachts belonging to members of a royal, national, or recognized yacht club.

253 85

II.

The officers of the club shall consist of a commodore, vice-commodore, rear-commodore, hon. treasurer, cup bearer, hon. secretary, and two auditors, all of whom shall be ex-officio members of committees and elected annually. Should any vacancy occur, it may be filled up by a special meeting of the club summoned for that purpose.

III.

The members shall meet annually on the first Thursday in March, at such place and at such hour as the general committee may appoint,
254 to receive the treasurer's report and to elect all officers and the sailing and house and pier committees; and the secretary shall summon by circular, stating the business, a special meeting on receiving directions from the commodore, vice-commodore, rear-commodore, treasurer, or on a requisition signed by not less than twelve members. Not less than five days' notice shall be given of any special meeting.

IV.

The sailing committee shall consist of nine members in addition to the officers, but no member shall take part in the discussion or decision upon any disputed question in which he is directly interested.
255 Five to form a quorum.

V.

The house and pier committee shall consist of six members in addition to the officers, and shall manage the club house, slip, quays, and gridiron under such rules and regulations as they may from time to time consider necessary. Three to form a quorum.

VI.

Of the foregoing committees the one-third who have attended
256 86 the fewest number of committee meetings during the preceding year shall be ineligible for reelection for twelve months. Should any members have made the same number of attendances the retirement shall be decided by lot.

VII.

The election of members and management of the affairs of the club shall be vested in a general committee, composed of the members of the sailing and house and pier committees. Seven to form a quorum.

VIII.

257 Any gentleman desiring to join the club shall be proposed by a member and seconded by another, and his name, address, profession or business, with the names of his proposer and seconder, shall be sent to the secretary for insertion in the circular (which must be issued

at least five days previously) summoning members of the general committee to the next meeting and hung up in the club room not less than seven days prior to that meeting, and he shall be balloted for at such meeting, one black ball in four to exclude.

IX.

Each member shall, on his admission, pay an entrance fee of one 258
guinea, and an annual subscription of one guinea, for which the treasurer or secretary shall give a receipt; and his proposer shall be liable for such entrance fee and his first year's subscription. Any member shall be allowed to compound his subscription for the sum of £10, which shall constitute him a life member.

X.

All subscriptions shall become due on the 1st of January in each year, and the secretary shall send a notice to all members who have not paid on the 31st of May, and should such members' sub-
87 scription remain unpaid on the 30th June, the secretary shall 259
post a list of such members in the club room; and any member failing to pay the same at or before the annual meeting following shall be liable to be excluded as a defaulter and be ineligible for reelection at any future time, unless sufficient reason can be shown to the contrary; provided, always, that any member elected after the 31st of August, and previous to the 1st of January following, shall not be liable to pay another subscription until the second January after election.

XI.

No member shall be allowed to take part in any debate or pro-
ceedings of the club, or to have a voice or vote upon any subject con- 260
nected with the club, until he shall have paid his subscription and all other sums which he may owe to the club.

XII.

Any member who may be absent from the United Kingdom during the whole period within which the annual subscription is payable may, at his option, on giving notice to the secretary, be considered a supernumerary member, and be exempt from subscription during the continuance of such absence.

XIII. 261

Any member wishing to withdraw from the club shall give notice in writing to the secretary to that effect, and shall pay all arrears due up to the date of his notice.

XIV.

All money collected shall be paid over to the treasurer, who shall keep a correct account of all monies received and disbursed by him

on account of the club; and his balance sheet for the year
262 88 (ending 31st December) shall be examined and signed by the auditors previous to the annual meeting, and a copy of the same shall be forwarded to each member, with the notice convening such meeting.

XV.

The treasurer shall report to the general committee, previous to 10th of May in each year, what amount of money will, in his opinion, be available for prizes during the season, and the general committee shall then decide what prize or prizes they will offer to be sailed for.

XVI.

263 All property belonging to the club shall be vested in the names of one of the flag officers and the treasurer for the time being, as joint trustees; and all funds of the club which shall not be required for the current expenses, or for prizes for the current year, shall be invested in their joint names in or upon such securities or investments as may be authorized from time to time by the general committee, and the trustees shall not be in any way responsible for the sufficiency of any security so authorized, or for any loss which may arise from the investment of any of the club funds thereon.

XVII.

264 The secretary shall keep correct minutes of all the proceedings of the club at general and committee meetings in books which must be produced at every meeting and be open to the inspection of any member at the club house, on his giving three days' notice in writing to the secretary.

XVIII.

The commodore, or senior officer in his absence, shall take the chair at all meetings of the club or general committee. In the event of no officer of the club being present, it shall be
265 89 imperative upon the member who may be elected by those present as chairman to take the chair, and on all questio s where there is an equality of votes the chairman shall have a casting vote in addition to his own. The sailing and house and pier committees shall each elect a chairman at their first meeting in the year.

XIX.

Five shall form a quorum at all general meetings.

XX.

No political or theological subject shall be discussed at any club meeting.

266 XXI.

Each member attending any general or committee meeting shall sign his name in a book kept for that purpose, and no member shall be eligible to vote or ballot unless he has complied with this rule.

XXII.

The club flag shall be the blue ensign of Her Majesty's fleet, with a crown over the "liver" in the fly of the ensign, agreeably to the warrant dated September 24th, 1844, granted to the club by the lords commissioners of the admiralty; and the burgee shall be blue, with the crown over the "liver." 267

NOTE.—Under the present admiralty regulations, each yacht requires a separate warrant to fly the blue ensign, which can be obtained by the secretary for yachts of any tonnage that have been registered at the custom house. Yacht owners flying the blue ensign without an admiralty warrant are liable to a penalty of £500.

XXIII.

No vessel which shall be used for any trade or business, or
90 for any other purpose than pleasure, shall be allowed to belong 268
to the club, or be entitled to the benefits or privileges thereof.

XXIV.

The owners of yachts shall open the season by sailing in company, the day to be fixed by the general committee in April.

XXV.

Before the annual meeting, the sailing committee shall decide what days shall be recommended for the regatta in each year. All other prizes given by the club may be sailed for on such days and under such regulations as the sailing committee may think requisite. 269

XXVI.

No yacht, whose owner or owners, or any of them, shall be in arrear in his or their subscription, or shall owe any sum to the club, shall be allowed to enter or sail in any matches of the club, and should such yacht be entered and sail, she shall forfeit all claim to the cup or prize.

XXVII.

The sailing committee shall decide in May, in each year, what regulations they will adopt for the management of the sailing matches, 270
and the same shall thereupon be considered the sailing regulations for the current year.

XXVIII.

Every yacht accompanying a race must fly her ensign.

XXIX.

In any matches when a steamer is engaged to attend, all admissions shall be on such terms as the general committee shall from time to time appoint.

271 91

XXX.

The club shall have the power to expel any member by ballot at a general meeting, notice of which shall be given in the circular convening the meeting, but the majority to expel such member shall be at least in the proportion of three to two.

XXXI.

Any member who may think himself aggrieved by any decision of the club, save and except the decision of the sailing committee, may appeal against the same, and the secretary shall summons a special meeting of the club to consider such appeal, provided it is
272 received by him within ten days after the decision has been given, together with a requisition for a special meeting, signed by not less than twelve members, and the decision of such special meeting shall be final.

XXXII.

Any member wishing to propose an alteration or addition to the laws of the club must furnish the secretary with a copy of the proposed alterations or additions, either ten days before the annual meeting, or with a requisition signed by not less than twelve members requiring a special meeting to be held, and the proposed alterations
273 or additions to the rules shall be printed in the circular convening the annual or special meeting, as the case may be. At the meeting the majority required to make any alteration or addition to the rules shall be in the proportion of at least three to two of those present and voting.

P. S.—It is requested, to ensure the accuracy of the club lists, that any member changing his residence, acquiring or disposing of a yacht, &c., will kindly inform the secretary of the same.

274 92 LIBELANT'S EXHIBIT 4.

List of members and yachts of the Royal Mersey Yacht Club. Corrected May, 1890. *Liverpool: James Laver, printer*, 66 *South*
275 *Castle street*, 1890.

Officers of the club: Commodore, Col. D. Gamble, C. B.; vice-commodore, S. G. Sinclair, esq.; rear-commodore, W. W. Pilking-
276 ton, esq., J. P.; hon. treasurer, R. B. Crowe, esq.; cup-bearer, C. H. Beloe, esq.; auditors, W. C. Gardner, esq., A. Nickels, esq.; hon. secretary, Capt. James Gladstone.

Club house, Mersey street, Birkenhead.

277 93 Sailing committee: A. D. Anderson, esq., Jas. Bell, esq., J. M. Caw, esq., E. H. Dulley, esq., J. A. Gardner, esq., W. Little, esq., C. Livingston, esq., C. MacIver, esq. (Woodslea), G. H. Willmer, esq.

278 House and pier committee: J. M. Caw, esq., Percy S. Cox, esq., J. F. Jellico, esq., C. Livingston, esq., R. Richardson, esq., A. Wilson, esq.

List of members and yachts.

V.

(Page 21.)
Van Alen, J. J., Rhode Island, U. S. 279
Vanderbilt, F. W., U. S. S. S. "Conqueror," 526.

94 LIBELANT'S EXHIBIT 5. 280

ROYAL MERSEY YACHT CLUB,
Birkenhead, January, 1892.

[R. B. Crowe, 13 King street, Liverpool, Hon. Treasurer.]

To F. W. Vanderbilt, esq., United States, to the Royal Mersey Yacht Club, Dr. 281

Jan. 1st, 1892, to subscription due for the year ending 31st Dec., 1892, due this day, £1 : 1 : 0.
Arrears.

The annual general meeting of the club will be held at the Alexandra Hotel, Dale street, Liverpool, on Thursday, the 3rd March, 1892, at 1.30 p. m., and it is requested that the above subscription may be paid to the hon. treasurer before that date, or to
Yours, obediently, 282

JAMES GLADSTONE,
Hon. Sec. R. M. Y. C.

P. S.—The annual regatta is fixed for July 4th and 5th.

95 [(42)—Inward manifest. Manifest of cargo from foreign port. Thomas W. Roe, stationer and printer, 63 Wall St., N. Y.] 283

Report and manifest of the cargo laden on board of the Br. st. yacht "Conqueror," of , whereof J. E. Wood is master, and which is of burthen 174.59 tons, built at Port-Glasgow, and owned by F. W. Vanderbilt, of New York, as per register granted at the day of and bound for New York from Halifax, N. S.

284

Marks.	No. inclusive.	Packages and contents.	By whom shipped.	To whom consigned or if to order.	Places of consignees' residence.	Ports of destination.
		No cargo. Pleasure yacht. Ship stores. Sundry small and broken stores.				New York.

(Signed) J. E. WOOD, *Master.* 285

96 (Indorsed:) Inward. Br. steam yacht "Conqueror," Wood, 286
Halifax. July 6, '91. Certified copy report and manifest on entry. Libelt's A., S. H. L. Port of New York, Aug. 31, 1891. Collector's office. I hereby certify the within oath and manifest to be 287
a true copy of the original on file in this office. Thos. J. Dunn, deputy collector. [Seal.] Paid Aug. 31, 1891. Fees rec'd, 20 cts. [Stamp.] 288

97 LIBEL'T'S EX. H.—S. H. L., 27–29th May.

289 Property of an Am. citizen.*

Nationality, British built. Crew, 23.

[N. Y. Cat., No. 450.]

Oath on entering foreign-built undocumented vessel from foreign port.*

I, J. E. Wood, do solemnly, sincerely, and truly swear that the report and manifest subscribed in my name, and now delivered by me to the collector at the port of New York, contains, to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, including packages of every kind and nature whatsoever, which were on board the steam yacht "Conqueror" at the time of her sailing from the port of †Halifax, N. S., or which have been laden or taken on board at any time since, and that the packages of the said goods are as particularly described as in the bills of lading signed for the same by me or with my knowledge; that I am at present, and have been during the voyage, master of the said vessel; that no package whatsoever, or any goods, wares, or merchandise have been unladen, landed, taken out, or in any manner whatever removed from on board the said vessel since her departure from the said port, except such as are now particularly specified and declared in the abstract or account herewith, and that the clearance and other papers now delivered by me to the collector are all that I now have, or have
290 had, that any way relate to the cargo of the said vessel. And I do further swear that the several articles specified in the said manifest as sea-stores for the cabin and vessel are truly such, and were bona fide put on board the said vessel for the use of the officers, crew, and passengers thereof, and have none of them been brought, and are not intended, by way of merchandise, or for sale, or for any other purpose than above mentioned, and are intended to remain on board for the consumption of the said officers and crew; and I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise, of any nature or kind whatsoever, than are contained in the report and manifest subscribed and now delivered by me, I will, immediately and without delay, make due report thereof to the collector of the district of the city of New York; and I do likewise swear that all matters whatsoever in the said report and manifest expressed, are, to the best of my knowledge and belief, just and true.

‡I further swear that no officer of the customs has applied for an inspection of the manifest of the cargo on board the said vessel, and that no certificate or indorsement has been delivered to me on any manifest of such cargo.

I do further, as required by law, solemnly swear that I have, to the best of my knowledge and belief, delivered, or caused to be delivered,

* Insert denomination and name of vessel.
† Insert the name of the place from whence the vessel last sailed.
‡ This clause to be omitted if the vessel has been boarded as per articles 148 and 149, General Customs Regulations of 1884.
Amendments on oath and manifest marked thus: (").

into the post-office at or nearest this port, every letter and every bag, parcel, or package of letters that were on board the said vessel during her last voyage, and that I have so delivered, or caused to be delivered, all such letters, bags, parcels, and packages as were in my possession, or under my power or control.

I further swear that the said vessel sailed from the said port of 291
* Halifax on the 2nd day of July, 1891.

(Signed) J. E. WOOD, *Master.*

Port of New York.

Sworn to before me this 6th day of July, 1891.

(Signed) JOHN H. GUNNER, *Deputy Collector.*

Sworn to before me this 11th July, 1891.

(Signed) JOHN H. GUNNER, *Dep. Coll.*

J. B. (Signed) J. E. WOOD.

98 (Indorsed:) Deaths, ; capitation tax, ; ton- 292
nage, 175 (say). Collector's fees,† $2.50; surveyor's fees,‡
.67; tonnage duty, exempt; pleasure vessel, H. O., $5.00; $8.17. 293
Light money, under sec. 4225, R. S., § 8508 and § 8160, on 238 tons,
@ 50 cents, $119.00. (Signed) John H. Gunner, D. C. J. N. J. 294
J. B. May.

99 III. 295

LIBELANT'S EXHIBIT B.—*S. H. L.*

CUSTOM-HOUSE, NEW YORK, SURVEYOR'S OFFICE,
July 10th, 1891.

HON. GEORGE W. LYON, *Surveyor*:

SIR: Please furnish this office with a certificate of tonnage of the foreign-built steam yacht "Conqueror," the property of Mr. F. W. Vanderbilt, of this city. 296

Respectfully, yours,

(Signed) J. J. COUCH,
Special Deputy Collector.

LIBELANT'S EXHIBIT C.—*S. H. L.*

PORT OF NEW YORK, SURVEYOR'S OFFICE,
January 21st, 1892.

I, Samuel M. Blatchford, special deputy surveyor of customs at 297
New York, hereby certify that the annexed is a true copy of the original certificate of admeasurement of the yacht "Conqueror," issued by me July 10, 1891, together with statement of the fees exacted by this office for such admeasurement.

In witness whereof I have hereunto set my hand and affixed the official seal of the said surveyer's office, this 21st of January, A. D. 1892.

[SEAL.] S. M. BLATCHFORD.

Paid Jan. 21, 1892.

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* Insert the name of the place from whence the vessel last sailed.
† Either $2.50 or $1.50, under section 2654.
‡ Either $3.00, or $1.50, or ⅔ of a dollar, section 4186.

298 100 .[N. Y. Cat. No. 969.]

CUSTOM-HOUSE, PORT OF NEW YORK.

Surveyor's fees for admeasurement of Brit. Prop. Yt. "Conqueror."

Hold	$18.00
Poop	
Cabin	
Forecastle	
3 deck houses, @ $1.50	4.50
Boiler, eng. & shaft	4.50
299 Crew space	1.50
	$28.50

(Ed. 9-14-'83—5,000.)

[N. Y. Cat. No. 1062.]

Certificate of the admeasurement of a foreign vessel.

300 DISTRICT OF NEW YORK, PORT OF NEW YORK,
July 10, 1891.

I certify that admeasurement has been made at this port of the (foreign-built) propelled yacht called the "Conqueror," of , and that her register length is one hundred and eighty-two and $\frac{6}{10}$ feet; her register breadth twenty-four and $\frac{8}{10}$ feet; her register depth thirteen and $\frac{5}{10}$ feet; her height under spar deck $\frac{}{10}$ feet; that she has a figured head, and an elliptic stern; one deck and
301 101 two masts, and that she measures two hundred and nineteen and $\frac{20}{100}$ tons, as follows:

		Tons.	100ths.
Capacity under the tonnage deck		346	04
Capacity between decks above the tonnage deck			
Capacity of permanent inclosures on the upper deck, viz:*			
Poop, break aft		2	17
House, forward		17	14
House, aft		4	45
Chart house, amid		2	11
Deductions—			
Propelling power	134.12	371	91
302 Crew space 50/0	18.59	152	71
Total tonnage		219	20

that the following-described spaces, and no others, have been omitted, viz:* No British registry shown.

S. M. BLATCHFORD,
For Surveyor of Customs.

E. M. T.

Examined and found "correct." Copy original.

July 21/92.—E. M. T.

303 * Name them all.

A.

(Endorsed:) No. 1062. Tonnage admeasurement of the British-built yacht, called the "Conquerer." District and port of New York, United States of America. July 10, 1891.

102 VI. 304

LIBELANT'S EXHIBIT D.—*S. H. L.*

TREASURY DEPARTMENT,
August 21, 1891.

SIR: The question as to whether the yacht "Conqueror," which was purchased in England by Mr. F. W. Vanderbilt and brought into the port of New York, shall be regarded as a dutiable importation, having been referred to the Solicitor of the Treasury, that officer, under date of 14th instant, advises this Department that said yacht is, in his opinion, liable to duty under the fair intendment of the 305 tariff act.

You will accordingly take the necessary steps for the appraisement of said vessel for duty, and the assessment and collection of duty thereupon according to law.

The question as to the liability of said yacht for tonnage tax should be referred by you to the Commissioner of Navigation, under synopsis 6466.

Respectfully, yours,

A. B. NETTLETON,
Assistant Secretary.

COLLECTOR OF CUSTOMS, 306
New York.

Copy.

103 VII. 307

LIBELANT'S EXHIBIT E.—*S. H. L.*

CUSTOM-HOUSE, NEW YORK, SURVEYOR'S OFFICE,
August 27th, 1891.

GEO. W. LYON, Esq.,
Surveyor of the Port.

SIR: I transmit herewith a copy of a communication of Assistant Secretary of the Treasury, A. B. Nettleton, dated the 21st instant, from which it appears that the Solicitor of the Treasury, under date of the 14th instant, advised the Treasury Department that the yacht 308 "Conqueror," purchased in England by Mr. F. W. Vanderbilt, and brought into the port of New York, is to be regarded as a dutiable importation. He also directs that the necessary steps be taken for the appraisement of said vessel for duty, and the assessment and collection of duty thereupon according to law.

As Mr. Vanderbilt, through his attorneys, refuses to make a voluntary entry of the said yacht, it becomes necessary for this office to take possession of the same on behalf of the United States. I therefore have to request that you, without delay, place a sufficient number of officers on board the yacht, to assure her safe custody, and to 309 report your action to this office.

I am informed by Mr. Vanderbilt that the yacht is, at this time (2.30 p. m.), coaling off Communipaw, and that she will proceed thence to anchorage at Stapleton. It is desirable that prompt action be taken in the matter.

Respectfully, yours,
(Signed) J. S. FASSETT, *Collector.*

310 104 VIII.

LIBELANT'S EXHIBIT F.—*S. H. L.*

CUSTOM-HOUSE, NEW YORK, SURVEYOR'S OFFICE,
August 27th, 1891.

To the Deputy Surveyor in charge of the 3rd Division.

SIR: The collector directs that the yacht "Conqueror," belonging to Mr. F. W. Vanderbilt, be taken possession of in behalf of the United States, the Treasury Department having decided that she is
311 to be regarded as a dutiable importation, and the owner refusing to make entry therefor.

You will please detail a sufficient number of officers to take possession of the yacht, and remain in custody thereof until further orders, and report the fact of such seizure to this office. The yacht was said to be, at 2.30 p. m., coaling off Communipaw, from which she intends to proceed to an anchorage at Stapleton.

Respectfully, yours,
(Signed) S. M. BLATCHFORD,
312 *Auditor in Charge of First Division.*

313 105 LIBELANT'S EXHIBIT G.—*S. H. L.*

PORT OF NEW YORK, COLLECTOR'S OFFICE,
January 21st, 1892.

I, J. J. Couch, special deputy collector of customs at New York, hereby certify that annexed hereto is a true copy of a letter from the collector to the Secretary of the Treasury, dated August 21st, 1891, relating to the matter of the assessment of duty upon the yacht "Conqueror," also a copy of a letter from the Acting Secretary of the Treasury to the collector, dated July 24, 1891, requesting report
314 in said matter.

In witness whereof I have hereunto set my hand and affixed the official seal of the said collector's office, this 21st day of January, A. D. 1892.

[SEAL.] J. J. COUCH,
Sp. Dep. Collector.

Copy.] TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., July 24, 1891.

COLLECTOR OF CUSTOMS,
315 *New York, N. Y.*

SIR: This Department has received a letter from the naval officer at your port, dated the 18th instant, calling attention to the fact that an undocumented British-built vessel, called the "Conqueror," which

was purchased abroad by Mr. F. W. Vanderbilt, was permitted to make entry at your port, on the 6th instant, without the payment of customs duty upon her value.

The naval officer suggests that the vessel is liable to such duty as an importation.

106 You will please report the facts in this case, together with 316
such comments as you may think proper to make.

Respectfully, yours,

O. L. SPAULDING,
Acting Secretary.

(No enclosures.)

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF NEW YORK,
August 1st, 1891.

SIR: I have the honor to acknowledge the receipt of Department 317
letter of the 24th ultimo (J. M. C.), stating that the naval office has called attention to the fact that an undocumented British-built vessel, called the "Conqueror," was permitted to make entry at this port, on the 6th ultimo, without payment of customs duty upon her value, and asking a report of the facts, together with such comments as may be deemed proper.

For reply as to the facts, I have to say that the yacht described was entered at this port on the 6th ultimo by her owner, Mr. F. W. Vanderbilt, a citizen of the United States. This vessel, which is a pleasure steam yacht, was formerly a British vessel. She was built at Glas- 318
gow, Scotland, in the year 1889, and registered at Hull, England. Her hull is of iron; length over all, 188 feet; gross tonnage, 386.18 tons; registered tonnage, 174.59 tons. She was purchased in London, May 7, 1891, by Mr. Vanderbilt, for 15,550 pounds sterling, from her British owner, Mr. W. S. Bailey, of Kingston-upon-Hull. The bill of sale for the same was recorded in this office July 10, 1891, a certified copy of which, together with a certificate of citizenship, was duly furnished the owner. She arrived at this port without cargo from Halifax, Nova Scotia, and made entry as aforesaid, paying light money
107 on demand, $119, but under protest. An appeal from this 319
exaction was considered by the Department, whereupon the decision of this office was affirmed. In relation to the liability of the said vessel to the payment of customs duty on her value, I cannot see how, in any proper legal aspect of the case, such duties could have been demanded and collected. When she was transferred to Mr. Vanderbilt, this vessel was navigating the high seas and is now so employed, although for purposes of pleasure and not of commerce. She sailed from England for Halifax almost at once upon her sale to Mr. Vanderbilt, and cleared thence for the United States. She has since sailed from this port, and is now at sea or on her voyage, expect- 320
ing to return as it suits the pleasure or convenience of her owner.

It has not been the theory or practice of the law to consider ships and vessels as subject to customs duties. By special provisions of law at different periods they have been subjected to tonnage dues when entering our ports, subject to special conditions in the nature of regulations of commerce or for revenue, more especially in the first instance

for the enforcement of fair treatment of our merchant marine by foreign countries, or for the prevention of unjust or burdensome discrimination. The ship or vessel within the view of the laws regulating
321 the collection of customs duties has been regarded as an instrument of commerce rather than an article of consumable property. (Husey v. Glover 119 U. S., 543). So that tonnage tax has been levied instead of customs duties, and this is as a tribute for the privilege of commercial intercourse. It has been based altogether on the number of tons, or size of the vessel, having no regard to value. An old hulk worth but a thousand dollars pays as great a tonnage as the most valuable vessel of the same carrying capacity that plows the sea.

Although articles specially named as for use in the equipment
322 108 of ships have been enumerated in tariff acts, in none has there been a provision specifically imposing a duty on the ship or vessel, for the very good reason that duty laws seek to tax the profits of merchants, the consumable products or articles which enter into the consumable mass of merchandise or property of the country. They presuppose a foreign shipment, an importer in the person of the consignee, named in the bill of lading; an importation or a bringing into the country; an arrival with intent to unlade or to land. (5 Cranch., 368, 1 Gall., 206, 348; 1 Peters, C. C., 256; 13 Pet., 486; 1 Gall., 365; 2 Gall., 204; 1 Wash., 158; 9 Cranch., 387).

323 A ship or vessel navigating the sea hardly fulfills these conditions. She is here one day and away the next. She may take on cargo for a foreign port, discharge at that port, then ship for another foreign port in a distant part of the world; repeat these voyages according to contingencies or the hope of profit, not to return to her own country, it may be, for an indefinite period. Her home or abiding place is not at the wharf or in the market, but on the ocean wave. She is in some essential features part of the national territory of the country whose flag she bears; offenses committed aboard, though on the high seas, are punishable by the courts of that country; peculiar conditions and laws attached to her, not applicable to goods, wares, and merchandise
324 on land. By special provisions of law of all commercial countries, she is required to have a name, the same as any subject of the realm, by which she may be known and identified in whatever situation she may be, and so that her character may be ascertained. The law treats her as a person. (4 Wall., 411; 1 Cliff., 463; 12 Wheat., 14; 16 Wall., 471.)

The requirements of law for the the entry of an importation of goods, wares, and merchandise, such as an invoice specifying the details of manufacture, purchase, port of shipment, principal market
109 of exporting countries, the requisite of appraisement, the con-
325 ditions attending an incomplete entry, are all singularly inapplicable to a ship or vessel. The claim of liability to customs duty, carried to its fullest extent, would necessarily be destructive of navigation and the carrying trade, for, applying the principles of the customs laws as to merchandise, she would become a new importation each time she arrived from a foreign port. But we need not pursue the argument on this line. It is enough to say that the tariff laws as to duty rates and amounts and their collection apply only to merchandise, or in the words of the statute, "goods, wares, and chattels of every description, capable of being imported." (R. S., 2766.)

In the case of U. S. v. A chain cable, etc., reported in 2nd Sumner, 326
263, it appears that the property had been purchased in Liverpool by the master of the ship "Marathon," to supply the place of a hempen cable which had become unseaworthy. The new cable was stowed aboard and used on the arrival of the vessel. The court held that, although the cable was landed, it was still part of the equipment of the ship, and it was remarked that it seems difficult to conceive how courts of justice can treat new rigging or equipments of a vessel as "goods, wares, and merchandise" within the meaning of the general revenue laws.

In the case of the Gertrude (3 Story, 68) a similar question arose with as strong an enunciation of the principle of law. 327

Here the court observed: If we look through the whole of the numerous acts of laying duties on merchandise imported, as well as those regulating the collection of the same, we shall find they uniformly contemplate the cargo; they refer to articles having the quality of merchandise in the ordinary and most popular sense of the word. As to the particular article there in question, the court further says: "The rigging and apparel of a ship are a part of the ship, and, therefore, not merchandise in any other sense of the word than
110 that in which the ship herself is." Again, the court say more 328 emphatically: The revenue laws in all cases contemplate a ship as a single object, and when it is subjected to any fiscal charge it is imposed under the name of a tonnage duty.

In the case of the U. S. vs. Hathaway (3 Mason, 324) the same court held, with regard to tonnage tax, that the charge is confined to the vessel and binds the owner, and in no respects applies to the importer of the cargo or the consignee of the vessel. It should be here observed that with respect to imported goods the customs laws at the time of that decision, previous to, and since, specifically regarded the consignee as the owner of imported goods, and the person to make 329 entry and alone to be held liable for customs duties.

By special provisions of law, time out of mind, a charge has been laid on ships and vessels, known as a tonnage tax, which the Supreme Court, in Huse v. Glover (119 U. S., 543), denominated a charge on the vessel "as an instrument of commerce." This imposition of a tax of a special character is in effect an exclusion of any charge which, under tariff laws, is laid by such general provisions, as for "manufacture of iron or metal," or for "manufacture of wood," or for unenumerated manufactures.

Decisions of the Treasury Department heretofore in some instances 330 seem to recognize the liability of a vessel to customs duty as an importation. Each case, however, has its peculiar facts. On July 30, 1885 (S. S., 7048), it was held that a steamboat was not entitled to free entry in Michigan as a personal effect or tool of trade of a fisherman. On December 22, 1886 (S. S., 7937), the decision was substantially the same as to a steam pleasure yacht, brought from Manitoba to St. Paul, Minn. On June 14, 1888 (S. S., 8901), in the case of the small steam yacht "Nautilus," brought to Rouses Point from Canada, and through the canals and Hudson
111 River to New York, for use in this country, there was held 331 to be a regular importation, and the vessel was declared dutia-

ble, notwithstanding that she propelled herself and did not come as freight. On August 8th, 1888 (S. S., 8975), in the case of the "Geneva," a ferryboat, brought to Cape Vincent from Canada, duties were exacted in consequence of a special act of Congress authorizing an American register, but with the condition of payment of duties legally chargeable thereon. (Stats., vol. 20, p. 473.) The Department interpreted this to mean customs duties. At an earlier period, however, August 18, 1881 (S. S., 4960), Mr. Windom, Secretary of the Treasury, decided in the case of the "Madge," a pleasure yacht
332 of 10 tons burden, that, although brought into New York on the deck of a vessel, the yacht may be regarded "as not goods, wares, and merchandise within the meaning of the tariff laws," and therefore not liable to such duties; subsequently, it appearing that the yacht had been sold in this country, and that she had been brought in as freight on another vessel, Mr. French, Assistant Secretary of the Treasury, decided that she was liable to duty.

Still earlier, May 23, 1871, S. S. 836, it was held as the status of a foreign-built vessel, purchased by United States citizens, that if
333 she arrives in ballast she will be subject to a lien tonnage tax of $1.00 per ton, in addition to the tonnage duty on a registered vessel, according to the provisions of the law then existing as to tonnage tax.

Without expressing any views as to the cases, it may be said that none of the vessels, except the vessel which was the subject of the decision last referred to, were of the character as to circumstances and conditions of the "Conqueror," the subject of this inquiry. She is a seagoing vessel, not intended for the inland pleasure resorts of the owner. She has heretofore navigated the high seas; has had a foreign register as belonging to the marine of a foreign country. She
334 112 was purchased with the intention of continuing that use as a vessel of the sea, and is now employed as other seagoing vessels, in navigation. She has arrived and departed as other seagoing vessels. The fact that she is to be used for pleasure purposes, for the private use of her owner solely, or that she is undocumented and denationalized, has no bearing on the question.

I do not see that the case differs in essential particulars from that of any foreign vessel brought to our ports for the ordinary purposes of commerce, or for any legitimate use within the mind of the owner. The fact is patent that, according to the decision of the courts, and to
335 a reasonable conception of the intent and aim of our revenue and navigation laws, she is not an importation, or an article intended to enter or entering into the body of the consumable commodities of the country. I have thus treated the subject with some elaboration, because the question is an important one, and if solved otherwise the case may be an embarrassing precedent, which has no circumstances to render it exceptional.

I cannot see how the law imposing customs duties can be applied to this vessel.

Very respectfully,

J. J. COUCH,
336 *Special Deputy Collector.*

HON. CHARLES FOSTER,
Secretary of the Treasury, Washington, D. C.

113 LIBELANT'S EXHIBIT J. 337

[N. Y. Cat. No. 233.]

Entrance of vessels—fee ticket.

CUSTOM-HOUSE, NEW YORK,
Cashier's Office.

Vessel: "Conqueror."

	Dollars.	Cents.
Entry fee	3	17
Tonnage		
Health officer	5	00
Capitation tax		
L. I. College Hospital		338
Deaths		
	8	17

Received payment, July 6, 1891.

J. B.

Stamp fees.

(Ed. 10-22-'89—10,000.)

[Customs regulations of 1884. Form 74. (N. Y. Cat. No. 460.) No. 927.] 339

Certificate of payment of tonnage duty.

[To be issued in all cases, under seals of collector and naval officer.]

[20 ct. stamp.] U. S. CUSTOM-HOUSE,
Port of New York.

I hereby certify that on this 11th day of July, eighteen hun-
114 dred and ninety-one, the tonnage duty of 50 cents per ton, 340
imposed by the provisions of section 4225, R. S., was paid on the *British-built undocumented steam yacht (property of an Am. citizen), "Conqueror," Wood, master, of † , by master, as per American admeasurement, 238 tons, amounting to one hundred and nineteen dollars, no cents.

The above payment was made on the 11th day of July, 1891. Vessel entered from Halifax, July 6, 1891.

Schedule of payments.

J. B. Number.	Date.	Tons.	Rate.	Amount.	Port of entry.
1st.					
2nd.					341
3d.					
4th.					
5th.					

Show this whenever vessel enters within tonnage year‡ to avoid overpayment of tax.

JAMES D. GUNNER,
Deputy Collector.

L. R. CLAY,
Deputy Naval Officer. 342

* Here give nationality, class, and name of vessel.
† Here give her home port.
‡ Tonnage year begins at first entry of vessel when tax is due.

343 115 LIBELANT'S EXHIBIT K.

PETITION FOR PROHIBITION.

To the Honorable Supreme Court of the United States of America:

The suggestion of J. Sloat Fassett against the district court of the United States for the southern district of New York respectfully alleges as follows:

He was the collector of customs for the port and collection district of New York from the 13th day of August, 1891, until the 30th day of September, 1891.

344 On or about the 6th day of July, 1891, Frederick W. Vanderbilt, a citizen of the United States, imported from a foreign country the foreign-built steam yacht "Conqueror" into the port of New York, and reported her arrival to the collector of customs of said port.

The said J. Sloat Fassett, as collector of customs at the port of New York, on the 27th day of August, 1891, in the performance of his duty under the laws of the United States, and in obedience to the following instructions of the Secretary of the Treasury, took possession of and detained said yacht or imported article for the enforcement of the payment of duties thereon:

345 TREASURY DEPARTMENT,
August 21, 1891.

SIR: The question as to whether the yacht "Conqueror," which was purchased in England by Mr. F. W. Vanderbilt and brought into the port of New York, shall be regarded as a dutiable importation having been referred to the Solicitor of the Treasury, that officer, under date of 14th instant, advises this Department that said yacht is, in his opinion, liable to duty under the fair intendment of the tariff act.

346 116 3 You will accordingly take the necessary steps for the appraisement of said vessel for duty, and the assessment and collection of duty thereupon according to law.

The question as to the liability of said yacht for tonnage tax should be referred by you to the Commissioner of Navigation, under synopsis 6466.

Respectfully, yours, A. B. NETTLETON,
Assistant Secretary.

COLLECTOR OF CUSTOMS,
New York.

347 (10560—1.)

By the laws of the United States the collector of customs is authorized and empowered, and it is made his duty, to take possession of imported articles in all cases of failure or neglect to make proper entry thereof or to pay the duties thereon, and to keep the same with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order upon payment of the proper duties and expenses.

By the laws of the United States, and particularly by the act of 348 Congress of June 10, 1890, entitled "An act to simplify the laws in

relation to the collection of the revenue," the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise and as to all fees and exactions of whatever character (except duties on tonnage) is made final and conclusive against the persons interested therein, unless the owner, importer, consignee, or agent shall pay said duties or exactions under protest, whereupon an appeal lies to the Board of General Appraisers, whose decision thereon is final, except where an application shall be filed for a further review in the United States circuit court. The tribunals men-
117 tioned in said act of June 10, 1890, have exclusive jurisdic- 349
tion of all questions as to rate and amount of duties chargeable upon imported merchandise and as to all fees and exactions thereon, and no collector or other officer of the customs is in any way liable to any importer, owner, consignee, or agent for or on account of any rulings or decision as to the classification of imported articles, or the duties charged thereon, or the collection of any dues, charges, or duties on or account thereof, or any other matter or thing as to which said owner, importer, consignee, or agent might, under said act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided in said act; and the district court 350
of the United States in and for the southern district of New York, proceeding as a court of admiralty and maritime jurisdiction, has not jurisdiction thereof.

Yet Frederick W. Vanderbilt, a citizen of the State of New York, as owner of the yacht "Conqueror," on the 1st day of September, 1891, filed his libel in the district court of the United States in and for the southern district of New York, proceeding as a court of admiralty and maritime jurisdiction, against the said yacht "Conqueror," and J. Sloat Fassett, as follows:

To the honorable the district court of the United States in and for the 351
southern district of New York:

The libel of Frederick W. Vanderbilt, owner of the vessel or steam yacht "Conqueror," her tackle, apparel, and furniture, against
4 all persons intervening for their interest therein, and against J. Sloat Fassett, who is now in possession thereof, in a cause of possession, civil and maritime, alleges as follows:

First. That libelant is a native-born citizen of the United States, residing in the city of New York.

118 Second. That said vessel was built in the year 1889 at 352
Glasgow, Scotland; that she is a sea-going schooner-rigged screw steamship; that her length is 182.6 feet, her main breadth 24.8 feet, her depth 13.5 feet, her gross tonnage 371.91 tons, and her net tonnage 219.20; that she was designed, intended, and constructed to navigate the high seas, not in the conveyance of passengers or merchandise for hire, but as a pleasure yacht only, and such is the only use to which she has ever been put or is intended to be put by libelant.

Third. That on or about the 7th day of May, 1891, Walter Samuel Bailey, of Kingston-upon-Hull, England, then being the registered 353
owner of said yacht, sold and delivered her to this libelant, by bill of

sale, in due and usual form, and this libelant at all times since has been and now is the true and only owner thereof and of her tackle, apparel, and furniture.

Fourth. That after the purchase of said yacht libelant cruised with her in the waters of Great Britain and Norway and upon the high seas till about the middle of June, 1891, when by direction of libelant she was navigated by her master to Halifax and thence to the United States, arriving in the port of New York on or about the 6th
354 day of July, 1891; that said master thereupon made due entry of said vessel at said port and reported her arrival to the collector of customs of said port and delivered to said collector the manifest, as prescribed by law; that said collector thereupon levied and collected on said yacht "light money," pursuant to section 4225 of the Revised Statutes of the United States; that upon arrival at said port as aforesaid the master of said yacht also presented to said collector said bill of sale for record and certification; that said collector thereupon recorded said bill of sale in his office and, having indorsed
355 119 upon the original thereof the following certificate, delivered back the same so indorsed to said master, namely:

I, Joel B. Erhardt, collector of customs for the port of New York, in the State of New York, in the United States of America, do hereby certify that the within bill of sale, bearing date of May 8th, 1891, of the foreign-built (British) yacht "Conqueror," length 182.6, breadth 24.8 feet, depth 13.5 feet; that she has a figurehead and elliptic stern, one deck, and two masts; that G. W. Lyon, surveyor, has certified that she measures 237.81 tons as follows:

		Tons.
Capacity under tonnage deck		346.04
356 Break, aft		2.17
House, forward		17.14
House, aft		4.45
Chart house, amid		2.11
Gross		371.91
Prop. power	134.12	
Crew space, 5.00	18.59	
		152.71
Net tonnage		219.20

5 sold and transferred by W. S. Bailey to Frederick W. Van-
357 derbilt, is in the form and substance valid and effective in law, and has been duly recorded in my office, and the said Frederick W. Vanderbilt is a citizen of the United States. As witness my hand and seal this 13th day of July, in the year of our Lord eighteen hundred and ninety-one.

[SEAL.] THOMAS J. DUNN,
Deputy Collector.

That said bill of sale so certified is a regular document, issued from a custom-house of the United States, proving said yacht to be
358 120 American property, and said yacht has carried the same ever since the recording and certifying thereof as aforesaid.

Fifth. That since prior to the 1st day of July, 1891, and to the arrival as aforesaid of said vessel in the waters of the United States, this libelant has been and now is a member of the Royal Mersey Yacht Club, and said vessel has been and now is enrolled among the yachts belonging to said yacht club; that said club is a regularly organized yacht club of a foreign nation, to wit, Great Britain, which extends, and at all times herein mentioned has extended, like privileges to the yachts of the United States, and by virtue of section 359
4216 of the Revised Statutes of the United States said yacht "Conqueror," at all times in this paragraph mentioned, has been and now is privileged to enter and leave any port of the United States without entering or clearing at the custom-house thereof or paying tonnage tax.

Sixth. That on the 27th day of August, 1891, in the navigable waters of the United States, in the harbor of New York, off Stapleton, within the jurisdiction of this court, J. Sloat Fassett, by his deputies, agents, and servants, illegally, wrongfully, and forcibly, without the consent and against the will of this libelant, took possession of 360
said yacht and has ever since detained her in his possession and custody, and has deprived this libelant of the use and control thereof.

Seventh. That the said Fassett is, and at the times in the last paragraph mentioned was, the collector of customs of the United States for the port of New York, and he took and kept and maintained possession of said yacht solely upon the claim that she was an article imported into the United States within the fair intendment of the customs-revenue laws, and as such liable to duty; that the
121 duties which accrued upon her importation were unpaid, and 361
that he was entitled to take and keep her in safe custody till such duties should be paid or secured, in the manner provided by law for articles imported into the United States; that the said vessel was not seized under any claim of authority therefor given by any provision of the law of the United States relating to commerce and navigation, or of any law of the United States providing a penalty or forfeiture.

Eighth. That, as this libelant is advised and verily believes, the said yacht is not an imported article within the true intent and meaning of the tariff or customs-revenue laws of the United States, and 362
under and by virtue of those laws said Fassett, in his official capacity or otherwise, has no right or authority to take or keep possession thereof.

Ninth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Whereupon the libelant prays that process in due form of
6 law according to the course of this honorable court in causes of admiralty and maritime jurisdiction may issue against the said vessel, her tackle, apparel, and furniture, and that the said J. 363
Sloat Fassett may be personally cited to appear and answer all the matters aforesaid, and that the said vessel, her tackle, apparel, and furniture, may be delivered to this libelant, and that the said J. Sloat Fassett may be condemned to pay to the libelant his damages and costs in the

premises, and that the libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

F. W. VANDERBILT.
ROOT & CLARKE,
Libelant's Proctors and Advocates.

364 122 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick W. Vanderbilt, the above-named libelant, being duly sworn, says that he has read the foregoing libel and knows the contents thereof, and that the same is true according to his information and belief.

F. W. VANDERBILT.

Sworn to before me this 31st day of August, 1891.

[SEAL.] JOHN T. KIRK,
Notary Public, Kings County, N. Y.

365 Cert. filed in N. Y. Co.

U. S. district court, southern district of New York.

FREDERICK W. VANDERBILT
vs.
YACHT "CONQUEROR" AND
366 J. Sloat Fassett. } In admiralty.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Samuel B. Clarke being duly sworn, that he is one of the libelant's proctors herein; that the nature of this cause is shown by the sworn libel on file, a copy of which, marked with deponent's initials, is herewith presented; that the libel with libelant's stipulation for costs was filed in the clerk's office on Sept. 1, 1891, and process returnable on the 15th proximo, directing the marshal to attach the
367 123 yacht and to cite respondent, Fassett, to appear, issued thereupon and placed in the hands of the marshal, who was at the time informed of the locality of said yacht, and who stated to deponent that he expected to execute the process that day.

Wherefore deponent prays:

1st. That libelant may be permitted to proceed with the cause without citing any other person to appear than said Fassett, and that the giving of notice of the pendency of the cause to all persons except
368 said Fassett by publication or otherwise may be dispensed with;

2nd. That the marshal may be required or permitted to make return of the process in his hands at an early day to be fixed by the court;

3d. That said yacht may be released to the libelant upon such terms as to security or otherwise as to the court may seem proper;

4th. That libelant may have such other or different relief as may be proper.

SAMUEL B. CLARKE.

Subscribed and sworn to before me this 2nd day of Sept., 1891.

[SEAL.] JOHN T. KIRK,
369 *Notary Public, Kings County.*

Cert. filed in N. Y. Co.

7 On the foregoing affidavit and on the libel and all proceedings herein:

Let the marshal and the respondent, J. Sloat Fassett, show cause before me at the U. S. court-house, New York city, on Tuesday, the 8th day of September, 1891, at 10 o'clock in the forenoon, why the prayers of said affidavit should not be granted and the libelant have such other or different relief as may be proper.

Dated Sept. 2, 1891.

CH. L. BENEDICT.

124 That the said yacht was not arrested by the marshal under the first process issued by the court under said libel, and an alias process was issued, returnable on the 6th day of October, 1891. 370

That the facts stated in the said libel do not constitute a "civil cause of admiralty and maritime jurisdiction."

At the time of the filing of said libel said yacht was in the waters of Richmond County, in the State of New York, and not within the territorial jurisdiction of the district court of the United States for the southern district of New York, but was within the territorial jurisdiction of the district court of the United States for the eastern district of New York. Said yacht so remained until the 29th day of 371 September, 1891. On the 29th day of September, 1891, said yacht was moved by the said collector into the territorial jurisdiction of the district court of the United States in and for the southern district of New York, and placed by said collector in store under general orders as follows:

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF NEW YORK,
September 29, 1891.

SIR: The steam yacht "Conqueror," an article imported from Great Britain at this port on the 6th day of July, 1891, not having been entered pursuant to law, and having accordingly been taken pos- 372 session of by the collector of this port, agreeably to the provisions of section 2963 of the Revised Statutes of the United States, you will please take charge of the same on behalf of the said collector, placing the same in store under general order, for which purpose the Erie Basin, in southern Brooklyn, in this district, is hereby designated.

Respectfully, yours,

J. J. COUCH,
Special Deputy Collector.
H. W. GOURLEY,
Naval Officer.

GEO. W. LYON, Esq.,
Surveyor of the Port.

125 On the 19th day of September, 1891, while the said yacht was in possession of the said collector as aforesaid, the marshal for the southern district of New York placed two of his deputies by force on board of said yacht, claiming thereby to have arrested said yacht under and by virtue of the following process issued out of and 373

by said district court of the United States, notwithstanding
8 that the inspector of customs previously on board said yacht and in charge thereof remained and still remains on board and in charge thereof as the custodian for the said collector of customs at the port of New York.

374 *Alias process issued under court's order.*

Date , 1891.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, greeting:

Whereas a libel in rem and personam hath been filed in the district court of the United States for the southern district of New York on the 1st day of September, in the year of our Lord one thousand
375 eight hundred and ninety-one, by Frederick W. Vanderbilt, against the steam yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett (cause of possession in which the libelant as owner of said yacht alleges that said Fassett, under a claim of official authority as collector of customs, has illegally and wrongfully deprived him of the possession of said yacht), for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said steam yacht or vessel, or tackle, &c., may be cited in general and special to answer the premises and all proceedings being
376 126 had that the steam yacht or vessel, her tackle, &c., may for the causes in the said libel mentioned be delivered to the libelant.

You are therefore hereby commanded to attach the said steam yacht or vessel, her tackle, &c., and to detain the same in your custody until the further order of the court respecting the same, and to give one notice of thirteen days (a shorter time than fourteen days having been directed by the judge of the court) to all persons claiming the same, or knowing or having anything to say why the same should not be delivered to the libelant pursuant to the prayer of the said libel,
377 that they be and appear before the said court, to be held in and for the southern district of New York, on the 6th day of October next at 11 o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and to make their allegations in that behalf.

Witness the Honorable Addison Brown, judge of said court, this 24th day of September, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and sixteenth.

SAMUEL H. LYMAN, *Clerk.*
378 ROOT & CLARKE,
Libelant's Proctors.

(Endorsed:) Vol. 37, page 274. Southern district of New York, United States district court. Frederick W. Vanderbilt against the

steam yacht "Conqueror," her tackle, &c., and against J. Sloat Fassett. Process in rem and personam. Returnable Oct. 6th, 1891. Root & Clarke, proctors for libelant. Filed. Let within process issue Sept. 23, 1891. Charles L. Benedict.

127 9 That the order to issue said process should not have been granted, the said yacht being at the time property taken and detained by said collector under authority of the revenue laws of the United States, and then being in the custody of the law. 379

Wherefore the said J. Sloat Fassett, collector, respectfully requests and prays remedy by writ of prohibition to be issued out of this honorable court to the judge of the district court of the United States in and for the southern district of New York, proceeding as a court of admiralty and maritime jurisdiction, to be directed to prohibit him from holding the plea aforesaid anywise further before him. 380

J. J. COUCH.
Spl. Dy. Collector.

Joseph J. Couch, special deputy collector of customs, and by law acting collector of customs of the port and collection district of New York, in the absence of the collector for said port and district, so constituted under his hand and seal, being duly sworn, saith that the facts stated in the foregoing suggestion are true.

J. J. COUCH.

Sworn to before me this 2d day of October, 1891.

P. J. ROON,
Notary Public, N. Y. Co. 381

10 Supreme Court of the United States. No. 10, original. October term, 1891. Ex parte: In the matter of Jacob Sloat Fassett, late collector of customs of the port of New York, petitioner. On petition for a writ of prohibition.

On consideration of the petition of Jacob Sloat Fassett, late
128 collector of customs of the port of New York, it is now here 382
ordered by the court that cause be shown by the judge of the district court of the United States for the southern district of New York before this court, at Washington, on the second day of November next, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of prohibition should not be granted as prayed in said petition.

October 19, 1891.

11 SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing are true copies of the peti- 383
tion for a writ of prohibition and the rule to show cause granted thereon, in the case entitled, Ex parte: In the matter of Jacob Sloat Fassett, late collector of customs of the port of New York, petitioner, No. 10, org'l, October term, 1891, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 26th day of October, A. D. 1891.

[SEAL.] JAMES H. MCKENNEY,
384 *Clerk of the Supreme Court of the United States.*

12 *To the Honorable the Justices of the Supreme Court of the United States:*

In compliance with the order to show cause, of which a certified copy is annexed hereto, the undersigned, United States district judge for the southern district of New York, respectfully returns and certifies as follows:

1. That from the 1st day of September to the 3rd of October, 1891, the undersigned was absent from the southern district of New
385 129 York, and that during that interval the Hon. Charles L. Benedict, judge of the eastern district of New York, acted pursuant to law as judge of the district court for the southern district of New York.

2. That annexed hereto is a certified copy of all the record and proceedings in this court in the case referred to in said order to show cause up to this date, including the libel, the three several processes issued to the United States marshal, with his returns thereto; the orders made by this court for the issuing of the second and third processes to the said marshal; the affidavits filed by the U. S. attorney in behalf of the collector; the appearance filed by the U. S. attorney and the answers and exceptions filed in behalf of the col-
386 lector of this port and of the late collector; and the endorse-
13 ments upon the said various papers showing the time of the filing thereof in the office of the clerk of this court.

3. That on the 6th day of October, 1891, upon the call before me of the second process issued to the marshal in said cause, and on his return made to the said process, the U. S. attorney appeared specially for the collector of the port and moved that no further proceeding be taken in the cause, on the ground that the action being a possessory
387 action only, for the recovery of the possession of a ship, the court should not proceed further therein without obtaining the control of the vessel, and that the court had no lawful power or jurisdiction to take such control; that the return of the marshal to the last-named process did not show that the ship was in his custody; but if the return so imported, then that the return was false; and leave was asked to file affidavits traversing the marshal's return; and the parties being heard on said motion, leave was granted the U. S. attorney to file such affidavits; and leave was also given to the marshal to file amendments to his return, stating additional facts, if desired;
388 130 and the matter being for that purpose further adjourned from day to day until the 8th day of October, 1891, the annexed ten affidavits were filed on that day; and no further return being made by the marshal, and it appearing that the marshal was not in the actual and undisputed control of said yacht, and consider-
14 ing that an alias process had previously been ordered by the court on application therefor before the Hon. Charles L. Ben-

edict, and considering that the yacht, having come into port in the ordinary course of navigation and not as merchandise upon any other ship, was not prima facie, and upon all the papers before me, an "imported article" within the meaning of the act of Congress 389
approved October 1, 1890, nor prima facie subject to customs duties, and that prima facie the collector had no authority in law to take or to detain the said vessel for duties, the court thereupon on application of the libelant's proctors made the order for a third process to the marshal, dated October 8, 1891, hereto annexed, to the end that the legal rights of the respective parties might be determined in the ordinary and regular course of judicial procedure in admiralty.

That to the last-named process, the marshal, on October 1, 1891, returned that he had taken exclusive possession of said yacht; on the same day the U. S. attorney entered an appearance for the collector and late collector of this port; and on the 15th day of October, 390
1891, their answers and exceptions to the libel were filed, of which copies are annexed.

And thereupon it is respectfully submitted whether or not this court should take further proceedings in the said cause.

Witness my hand this 29th day of October, 1891.

ADDISON BROWN,
U. S. Dist. Judge.

131 15 U. S. district court, so. dist. N. Y. 391

FREDERICK W. VANDERBILT
vs.
YACHT "CONQUEROR" AND J. SLOAT FASSETT. } In admiralty.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York, ss:

Samuel B. Clarke being duly sworn, that he is one of the libelant's proctors herein; that the nature of this cause is shown by the sworn 392
libel on file, a copy of which, marked with deponent's initials, is herewith presented; that the libel, with libelant's stipulation for costs, was filed in the clerk's office on Sept. 1, 1891, and process returnable on the 15th proximo directing the marshal to attach the yacht and to cite respondent Fassett to appear, issued thereupon and placed in the hands of the marshal, who was at the time informed of the locality of said yacht, and who stated to deponent that he expected to execute the process that day.

Wherefore deponent prays:

16 1st. That libelant may be permitted to proceed with the 393
cause without citing any other person to appear than said Fassett, and that the giving of notice of the pendency of the cause to all persons except said Fassett, by publication or otherwise, may be dispensed with.

2d. That the marshal may be required or permitted to make return of the process in his hands at an early day to be fixed by the court.

3d. That said yacht may be released to the libelant upon such terms as to security or otherwise as to the court may seem proper.

394 132 4th. That libelant may have such other or different relief as may be proper.

SAMUEL B. CLARKE.

Subscribed and sworn to before me this 2d day of Sept., 1891.

[SEAL.] JOHN T. KIRK,
Notary Public, Kings County.

Cert. filed in N. Y. Co.

On the foregoing affidavit and on the libel and all proceedings herein:

395 Let the marshal and the respondent, J. Sloat Fassett, show cause before me at the U. S. court-house, New York City, on Tuesday, the 8th day of September, 1891, at 10 o'clock in the forenoon, why the prayers of said affidavit should not be granted and the libelant furnish other or different relief as may be proper.

Dated Sept. 2, 1891.

CHAS. L. BENEDICT.

17 (Endorsed:) Service of copy of within affidavit and order to show cause is admitted the 2d day of Sept., 1891. J. S. Fassett, collector, by D. F. Phelps, depy. collector. Served copy on marshal and U. S. district attorney, Sept. 2, '91. R. H. U. S. district 396 court, so. dist., N. Y. In admiralty. Frederick W. Vanderbilt vs. Yacht "Conqueror" and J. Sloat Fassett. Affi. and order to show cause. Root & Clarke, libelant's proctors, 32 Nassau st., N. Y. City.

397 133 18 District court of the United States for the southern district of New York.

FREDERICK W. VANDERBILT
against
YACHT "CONQUEROR" AND J. SLOAT FASSETT.

398 I, Charles L. Benedict, judge of the district court of the United States for the eastern district of New York, and, in respect of the matters hereinafter mentioned, acting, pursuant to section 600 of the Revised Statutes of the United States, as district judge for the southern district of New York, certify as follow:

I.

That upon the affidavit hereto annexed, of one of the proctors for the libelant in this case, I made the order to show cause which is hereto attached; that upon the 8th day of September, 1891, said order to show cause came on for hearing before me, and was partially argued by the advocate for the libelant and by the district attorney 399 in opposition, when the attention of the court being called to the fact that no return of the process had been made by the marshal, the matter of said order to show cause was postponed indefinitely, and was not thereafter renewed before me. That on September 15, 1891,

it appearing by the return made by the marshal to the original
19 process issued in this case that the marshal had made no seizure of the vessel, the proctors for the libelant moved in open court, the district attorney being then present, for an alias process; that, the district attorney then stating that he
134 appeared specially for the collector of customs to oppose said 400 motion, said motion was argued by the advocate for the libelant and by the district attorney in opposition orally and upon briefs, and after consideration I made the order appearing on file for the issuance of alias process and for the publication of notice of the suit.

Witness my hand this 26th day of October, 1891.

CHAS. L. BENEDICT.

20 (Endorsed:) District court of the U. S. for the southern district of New York. Frederick W. Vanderbilt against yacht "Conquerer" and J. Sloat Fassett. Certificate of Judge Benedict, with original order to show cause on the subject of releas- 401 ing the yacht on security.

[To the returns of the judge were annexed an attested copy, dated Oct. 30, 1891, of all proceedings as herein set forth.] 402

135 LIBELANT'S EXHIBIT L. 403

Supreme Court of the United States. No. 10, original. October term, 1891. Ex parte: In the matter of J. Sloat Fassett, petitioner. On petition for a writ of prohibition. (January 11th, 1892.) 404

Mr. Justice BLATCHFORD delivered the opinion of the court.

On the 7th of May, 1891, Frederick W. Vanderbilt, a native-born citizen of the United States, residing in the city of New York, purchased in England, from one Bailey, who was her registered owner, a sea-going, schooner-rigged, screw steamship, called the "Conqueror," built at Glasgow, Scotland, of the gross tonnage of 371.91 tons, designed, intended, and constructed to navigate the high seas, not in the conveyance of passengers or merchandise for hire, but as a pleasure yacht only, which was the only use to which she ever had been 405 put, or was intended to be put, by the purchaser. Bailey delivered to the latter a bill of sale in due form. The yacht was navigated to Halifax and thence to the United States, arriving in the port of New York on July 6, 1891. Her master made due entry of her at that port, and reported her arrival to the collector of customs there, and delivered to him the necessary manifest. The collector thereupon collected light-money upon her, under § 4225 of the Revised Statutes. The master also presented to the collector the said bill of sale, for record and certification. It was recorded in the collector's
136 office, and he endorsed upon it a certificate and delivered it 406 back, so endorsed, to the master. The certificate was dated July 13, 1891, and was to the effect that the bill of sale was in the form and substance valid and effective in law, and had been duly recorded in his office, and that Vanderbilt was a citizen of the United States.

Prior to July 1, 1891, and to the arrival of the yacht in the waters of the United States, Vanderbilt had been and continued to be a member of the "Royal Mersey Yacht Club," and the vessel was enrolled among the yachts belonging to that club, which is a regularly organized yacht club of Great Britain, which country extends
407 like privileges to the yachts of the United States; and, under § 4216 of the Revised Statutes, she was privileged to enter and leave any port of the United States without entering or clearing at the custom house or paying tonnage tax.

On the 21st of August, 1891, the Assistant Secretary of the Treasury notified J. Sloat Fassett, then collector of customs at the port of New York, that the Solicitor of the Treasury had advised the Treasury Department that the yacht was liable to duty under the fair intendment of the tariff act, and directed the collector to take the necessary steps for the appraisement of her for duty, and to have
408 the duty upon her assessed and collected according to law.

On the 27th of August, 1891, in the navigable waters of the United States, in the harbor of New York, off Stapleton, within the jurisdiction of the district court of the United States for the southern district of New York, Fassett, without the consent and against the will of Vanderbilt, forcibly took possession of the yacht and deprived Vanderbilt of the use and control of her, and detained her for the enforcement of the payment of duties upon her.

On the first of September, 1891, Vanderbilt filed a libel in
409 137 the district court of the United States for the southern district of New York against the yacht and Fassett, setting forth the foregoing matters and averring that the seizure of the yacht by Fassett was illegal and wrongful, and solely upon the claim that she was an article imported into the United States within the fair intendment of the customs revenue laws, and, as such, liable to duty; that the duties which accrued upon her importation were unpaid; and that the collector was entitled to keep her in custody until they should be paid or secured; and averring that she was not seized under any claim of authority given by any provision of the laws of the United States relating to commerce and navigation, or of any law providing
410 a penalty or forfeiture. The libel further averred that the yacht was not an imported article within the true intent and meaning of the tariff or customs revenue laws of the United States; that Fassett, in his official capacity or otherwise, had no authority to keep possession of her; and that the premises were within the admiralty and maritime jurisdiction of the United States and of the court. The libel prayed for process against the yacht and Fassett personally, and for the delivery of the yacht to the libelant, and for the condemnation of Fassett to pay damages and costs.

On the filing of the libel the proper stipulation for costs was given
411 on the part of the libelant, and process of attachment was issued against the vessel, returnable September 15, 1891, with a monition to Fassett. By the return to that process it appeared that the marshal had not seized the vessel. On motion, and after hearing both parties, the court issued an alias process on September 24, 1891, returnable October 6, 1891. The marshal made a return to this that he had

attached her on September 29, 1891, and given the proper notice. Fassett having resigned his office, Francis Hendricks was appointed collector of customs in his place, and on October 1, 1891, took
138 possession of the vessel and held her for the payment of duties 412
upon her as an article imported into the United States. As the marshal's return to the alias process did not show that the vessel was in his custody, the court issued to him on October 8, 1891, a third process, returnable October 13, 1891, to which he made return that on October 8, 1891, within the jurisdiction of the court, he had attached her by taking full and exclusive possession of her; that since such attachment he had been and was in exclusive possession of her under said process; and that he had given due notice.

On the 13th of October, 1891, the United States attorney entered his appearance as proctor for Fassett personally and as late collector on behalf of the United States, and for Hendricks as collector and 413
claimant on behalf of the United States. On October 15, 1891, he filed an answer and exceptions for Fassett personally, and a claim, answer, and exceptions for Fassett as late collector on behalf of the United States, and a claim, answer, and exceptions of Hendricks, collector, on behalf of the United States The substance of those papers was to the effect that the possession of the vessel by the collector was not wrongful, because she was an article imported from a foreign country and subject to duties under the revenue laws of the United States; that the court had no jurisdiction of the matters contained in the libel, because the cause was not a civil cause of admiralty and 414
maritime jurisdiction, and the possession of the collector on behalf of the United States was provided for by the revenue laws of the United States, and the vessel was properly taken or detained by the collector under authority of such laws, and in custody of the law; and a restitution of the vessel to the collector was asked for.

On the 19th of October, 1891, on a petition to this court, filed by Fassett, setting forth the material parts of the foregoing statement, this court issued an order to the judge of the district court of
139 the United States for the southern district of New York, 415
returnable November 2, 1891, to show cause why a writ of prohibition should not issue to him, to prohibit him from further holding the aforesaid plea. To this order to show cause the judge has made due return, and the matter has been argued here by the counsel for both parties.

The principal question discussed at the bar was as to whether the "Conqueror" is liable to duty as an article imported from a foreign country into the United States; but, in the view we take of the case, we do not find it necessary or proper to consider that question, because we think that upon other grounds the writ of prohibition must be denied.

It is contended on behalf of the petitioner, Fassett, that when he, 416
as collector, took possession of the yacht and decided that she was dutiable, the only remedy open to her owner was to pay, under protest, the duties assessed upon her, and in that way secure possession of her, with the right thereafter, as provided in sections 14 and 15 of the customs administrative act of June 10, 1890 (26 Stat., 131, 137,

138), to obtain a refund of those duties by taking an appeal from the decision of the collector to the Board of General Appraisers, and appealing, if necessary, from that Board to the circuit court of the United States.

417 The idea embodied in the libel is that if the yacht was not an imported article the act of the collector in forcibly taking possession of her was tortious, and, as that act was committed on the navigable waters of the United States, the district court, as a court of admiralty, had jurisdiction, in a cause of possession, to compel the restitution of her. The libel presents for the determination of the district court, as the subject-matter of the suit, the question whether the yacht is an imported article within the meaning of the customs revenue laws. The matter is sub judice in the district court. All it has done so far towards determining the question is to issue process and
418 140 obtain control of the vessel, so that the question might be formally raised by pleading, and to receive the pleadings of the respondent and the claimant raising the question. The district court has jurisdiction to determine the question, because it has jurisdiction of the vessel by attachment, and of Fassett by monition; and for this court to decide in the first instance, and in this proceeding, the question whether the yacht is an article imported from a foreign country, and subject to duty under the customs revenue laws, would be to decide that question as a matter of original jurisdiction, and not of appellate jurisdiction, while, as a question of original jurisdiction,
419 it is duly pending before the district court of the United States on pleadings which put that very question in issue.

In November, 1891, this court was petitioned by one Sturges to issue a writ of prohibition to forbid the district court of the United States for the eastern district of New York, sitting as a court of admiralty, from further proceeding in certain causes in which it had entertained libels against certain vessels, in rem, and had attached the vessels, Sturges claiming title to them, as a receiver appointed by a State court of New York, by a prior title, and having set up such title, in answers to the libels, and alleged want of jurisdiction in the district court over the vessels. This court denied the application for
420 the writ without delivering any opinion, but the ground of the denial was that the matter was in course of litigation in the district court on due process.

A like view was taken by this court in Ex parte Easton (95 U. S., 68); Ex parte Gordon (104 U. S., 515); Ex parte Ferry Company (id., 519); Ex parte Hagar (id., 520), and Ex parte Phenix Ins. Co. (118 U. S., 610, 625, 626).

The subject-matter of the libel is a marine tort, cognizable in a cause of possession in admiralty by any district court of the United States which finds the vessel within the territorial limits of its
421 141 process. (Constitution, art. 3, sec. 2, Rev. Stat., § 563; Slocum v. Mayberry, 2 Wheat., 1; The North Cape, 6 Bissell, 505; The J. W. French, 13 Fed. Rep., 916; The Haidee, Stewart's Vice-Adm. Cases (Quebec), 25; Matter of Blanshard, 2 Barn. & Cres., 244; The Beatrice, 36 Law Jour. N. S. Adm., 10; The Telegrafo, L. R. 3 Priv. C., 673, 686; Burke v. Trevitt, 1

Mason, 96; L'Invincible, 1 Wheat, 238; The Santissima Trinidad, 7 Wheat, 283; Betts' Adm. Prac., 19; Benedict's Admiralty, § 311; Williams & Bruce Adm. Prac., 17; Cohen's Adm. Law, 32; Henry's Admiralty, §§ 19, 31; Phila., &c., R. R. Co. v. Havre de Grace Steam Tow Boat Co., 23 How., 209; Galena, &c., Packet Co. v. Rock Island Bridge Co., 6 Wall., 213; Jackson v. The Mag- 422
nolia, 20 How., 296; Leathers v. Blessing, 105 U. S., 626.)

It is provided by § 2785 of the Revised Statutes, that the owner of imported merchandise shall make entry of it with the collector within a specified time. Section 2963 provides that when merchandise imported into the United States has not been duly entered, it shall be deposited in the public warehouse and there remain. Section 2964 provides that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, the merchandise shall be taken possession of by the collector and deposited in the public stores, there to be kept, subject 423
at all times to the order of the importer, on payment of the proper duties and expenses. Section 2973 provides that if the merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, it is then to be appraised and sold by the collector at public auction, and the proceeds, after deducting for storage and other charges and expenses, including duties, are to be paid over to the importer. Section 934 provides as follows: "All property taken or detained by any officer or other person under author-
142 ity of any revenue law of the United States, shall be irreplev- 424
iable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

By their respective claims, answers, and exceptions, Fassett, as late collector, and Hendricks, as collector, both of them allege that the vessel is "property taken or detained by the collector of the port, under authority of the revenue laws of the United States, and in custody of the law." Such property, by § 934 of the Revised Statutes, is expressly made subject "to the orders and decrees of the courts of the United States having jurisdiction thereof." On the facts set forth in the libel, the district court of the United States for the 425
southern district of New York had jurisdiction of the vessel, as property detained by the collector under authority of a revenue law of the United States; and, while it was so in the custody of the law that it must continue to be detained by the collector, subject "only to the orders and decrees of the courts of the United States having jurisdiction thereof," it was subject to such orders and decrees.

As the district court in the present case has jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition is not intended to take the 426
place of exceptions to the libel for insufficiency, and will issue only in case of a want of jurisdiction either of the parties or the subject-matter of the proceeding.

The libelant has no other remedy than the filing of this libel. He has none under the customs administrative act, of June 10, 1890. (26 Stat., 131.) By § 14 of that act, the decision of the collector as

to "the rate and amount" of duties chargeable upon imported merchandise is made final and conclusive, unless the owner or importer, within the time limited after the ascertainment and liquida-
427 143 tion of duties, shall give notice in writing to the collector, with the reasons for his objections, and, if the merchandise is entered for consumption, shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment, the collector is to transmit the papers to a board of three general appraisers, who are to examine and decide the case, and their decision, or that of a majority of them, is to be final and conclusive, except when, under § 15 of the act, an application shall be filed in the circuit court of the United States. By § 15 application may be made to that court for a review of the questions of law and fact involved in the decision of the board of general appraisers; and, on
428 the evidence taken by that board, and further evidence, if given, that court is to hear and determine such questions of law and fact "respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." By § 25 the right of action is taken away to sue a collector or other officer of the customs on account of any rulings or decisions as to the classification of the merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of such merchandise, or any other matter or thing as to which, under the act of June 10, 1890, the owner or importer may be entitled to appeal from the decision of the collector or other officer, or from any board of
429 appraisers provided for in the act.

The appeal provided for in § 15 brings up for review in court only the decision of the board of general appraisers as to the construction of the law, and the facts respecting the classification of imported merchandise, and the rate of duty imposed thereon under such classification. It does not bring up for review the question of whether an article is imported merchandise or not; nor, under § 15, is the ascertainment of that fact such a decision as is provided for. The decisions of the collector from which appeals are provided for by
430 144 § 14 are only decisions as to "the rate and amount of duties charged upon imported merchandise, and decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character. Nor can the court of review pass upon any question which the collector had not original authority to determine. The collector has no authority to make any determination regarding any article which is not imported merchandise; and if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the
431 libel in the district court, on which the rights of the libelant depend.

Under the customs administrative act, the libelant, in order to have the benefit of proceedings thereunder, must concede that the vessel is imported merchandise, which is the very question put in contention under the libel, and must make entry of her as imported merchandise, with an invoice and a consular certificate to that effect, and thus estop himself from maintaining the fact which he alleges in his libel, that she is not imported merchandise.

The vessel in this case was not seized for forfeiture. If she had been, that seizure would be one to be followed by a suit for forfeiture, instituted by the United States, and thus she would be brought within 432
the jurisdiction of a court of the United States. But she is not to be prosecuted in court by an affirmative proceeding instituted by the United States to recover the duties upon her as an imported article, which are claimed by the United States; and thus the only way in which she can be brought under the jurisdiction of a court of the United States is by the institution of the libel in question.

The writ of prohibition is denied.

145 LIBELANT'S EXHIBIT M. 433

SUPREME COURT OF THE UNITED STATES.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the order of said Supreme Court, entered on the 11th day of January, 1892, in the case entitled, Ex parte: In the matter of J. Sloat Fassett, petitioner, No. 10, original, October term, 1891, as the same remains upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 20th day 434
of January, A. D. 1892.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Supreme Court of the United States. No. 10, original. October term, 1891. Ex parte: In the matter of J. Sloat Fassett, petitioner. On petition for a writ of prohibition.

On consideration of the petitioner for a writ of prohibition of the 435
return to the rule to show cause issued herein, and of the argument of counsel thereupon had, as well in support of as against the same,

It is now here ordered by the court that said petition be, and the same is hereby, denied.

January 11, 1892.

(Libel't's Ex. M. S. H. L.)

146 The libelant further offered in evidence (1) the Solicitor's 436
General's brief in the U. S. Supreme Court on behalf of J. Sloat Fassett, petitioner; (2) the memorandum of the district attorney submitted by the Solicitor-General; (3) the brief submitted to the Supreme Court on behalf of the libelant in opposition to the petition.

The aforesaid evidence having been offered by the libelant as evidence of the matters litigated in the Supreme Court.

The appellant hereby admits that all the questions raised in and by the said petition of J. Sloat Fassett were considered in and presented to the court by the said briefs and memorandum; 437

And the appellee, in consideration of the above admission, hereby consents that the aforesaid briefs and memorandum be not printed herein. 438

439 147 LIBELANT'S EXHIBIT Q.

TREASURY REGULATIONS.

Undocumented vessels wholly owned by citizens of the United States.

ART. 93. Foreign-built or denationalized vessels, purchased and wholly owned by citizens of the United States, whether purchased of belligerents or neutrals during a war to which the United States are not a party, or in peace of foreign owners, are entitled to the protection of the authorities and flag of the United States, as the property
440 of American citizens, although no register, enrollment, license, or other marine document, prescribed by the laws of the United States, can be lawfully issued to such vessels.

ART. 94. To enable, however, the owners of a vessel so circumstanced to protect their rights, if molested or questioned, the collector of the customs, though forbidden by law to grant any marine document or certificate of ownership, may lawfully make record of the bill of sale in his office, authenticate its validity in form and substance, and deliver to the owner a certificate to that effect, certifying, also, that the owner is a citizen of the United States.

441 These facts, thus authenticated, if the transfer was in good faith, entitle the vessel to protection as the lawful property of a citizen of the United States; and the authentication of the bill of sale and of citizenship will be prima facie proof of such good faith.

ART. 95. In all cases, therefore, where the evidence of the purchase of a foreign vessel by a citizen of the United States, with proof of citizenship and of the bona fide character of the purchase, shall be furnished to a collector of the customs, he will, if the
442 148 proof be satisfactory and purchase deemed in good faith, record the bill of sale in his office and deliver to the party the original with a certificate endorsed thereon in the following form:

[Form No. 29.]

Certificate upon bill of sale.

I, , collector of the customs for the port of , in the State of , in the United States of America, do hereby certify that the within bill of sale, bearing date of of the (here describe the vessel, her tonnage, denomination, name, &c.), sold and
443 transferred by to is, in form and substance, valid and effective in law, and has been duly recorded in my office; and that the said (meaning the owners) are citizens of the United States.

As witness my hand and seal this day of , in the year of our Lord 18 .

[L. S.]

ART. 96. Before granting such certificate the collector of the customs willre quire the tonnage of the vessel to be duly ascertained in pursuance of law, and insert the same in the description of the vessel in his certificate.

ART. 97. A separate record will be kept of these vessels, and in 444
the tonnage returns they will be reported in a separate column under the head of "Foreign-built or undocumented vessels owned by citizens of the United States."

149 CLAIMANT'S EXHIBIT 1.—S. H. L. 445

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington., D. C., Sept. 25, '91.

To the COLLECTOR OF CUSTOMS,
New York City, N. Y.

SIR: Your letter of September 22nd, 1891, has been considered, and you are instructed in the event that a second writ of attachment is issued by the United States district court for the southern district of New York, against the steam yacht "Conqueror," not to resist 446
by force the service of the writ, and if you are compelled to yield possession of the vessel you will do it under protest.

The United States attorney for the district will be instructed that in the event the district court assumes to exercise jurisdiction in the premises, and take from your custody the property, he shall proceed at once to secure a writ of prohibition from the Supreme Court directed to the judge of the district court for the southern district of New York.

Respectfully, yours,

CHARLES FOSTER, *Secretary.* 447

Copy.

150 CLAIMANT'S EXHIBIT 2.—S. H. L. 448

WASHINGTON, D. C., *Sept.* 28, 1891.

COLLECTOR OF CUSTOMS, *New York.*

SIR: Allow yacht "Conqueror" to be transferred to Erie Basin, Brooklyn.

O. L. SPAULDING,
Assistant Secretary.

Copy of telegram.

CLAIMANT'S EXHIBIT 3.—S. H. L. 449

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF NEW YORK,
September 29th, 1891.

GEORGE W. LYON, Esq.,
Surveyor of the Port.

SIR: The collector received a telegram from the Secretary of the Treasury late yesterday afternoon, authorizing the transfer of the steam yacht "Conqueror" to the Erie Basin.

After consultation with the captain of the "Conqueror," you will 450
please cause the transfer to be made. It is suggested that the towing be done by a Government boat. The transfer having been authorized

on account of the unsafe position in which the "Conqueror" lies at present in case of storm, it is desirable that the transfer should be made as promptly as is practicable.

Respectfully, yours,

DUDLEY F. PHELPS,
Deputy Collector.

Copy.

451 151 (Endorsement:) Respectfully returned to the collector, his instructions having been complied with. G. W. Lyon, surveyor. September 30, 1891.

CLAIMANT'S EXHIBIT 4.—S. H. L.

OFFICE OF THE COLLECTOR OF CUSTOMS,
PORT OF NEW YORK,
452 *September* 29, 1891.

SIR: The steam yacht "Conqueror," an article imported from Great Britain, at this port on the 6th day of July, 1891, not having been entered pursuant to law, and having accordingly been taken possession of by the collector of this port, agreeably to the provisions of section 2963 of the Revised Statutes of the United States, you will please take charge of the same on behalf of the said collector, placing the same in store under general order, for which purpose the Erie Basin, in South Brooklyn, in this district, is hereby designated.

453 Respectfully, yours,

J. J. COUCH,
Special Deputy Collector.
H. W. GOURLEY,
Naval Officer.

GEO. W. LYONS, Esq.,
Surveyor of the Port.

454 152 United States district court, southern district of New York.

455 FREDERICK W. VANDERBILT *vs.* THE STEAM YACHT "CONQUEROR" AND J. Sloat Fassett. } In admiralty.

Elihu Root and Samuel B. Clarke for the libelant; Edward Mitchell, United States district attorney, and Henry C. Platt, assistant United States district attorney, for the claimant and respondent.

BROWN, J. On September 1, 1891, the libelant brought the above possessory action against J. Sloat Fassett, collector at this port, to
456 recover possession of his yacht, the "Conqueror," which the collector had taken and held in his custody on the claim that she was subject to customs duties. The authority of the court to proceed in the matter being denied, the marshal, under an alias process and the explicit order of the court, under its general powers and § 934, Rev. St., took the yacht out of the possession of the officers of customs into his

exclusive custody; and thereafter on the 19th of October, 1891, upon the application of Fassett to the Supreme Court, an order was obtained requiring this court to show cause why a writ of prohibition should not issue forbidding this court from further entertaining the
153 cause. On the hearing of that order the question, both of 457
the jurisdiction of this court and whether the yacht was dutiable under the customs laws, was fully argued. The Supreme Court denied the writ of prohibition on the ground that this court had lawful jurisdiction, both of the parties and of the subject-matter, without considering whether the yacht was liable to duty as an imported article.

The proofs since taken sustain the main facts stated in the libel and the answer. The defendant claims no other right to the custody of the yacht than for the collection of customs duties. The proofs show that Mr. Vanderbilt, a native born citizen of the United States and a member of the Royal Mersey Yacht Club of England, purchased the 458
yacht in England, on May 7, 1891, of W. S. Bailey, the registered owner of the yacht, by a bill of sale in the usual form; that after cruising in the waters of Great Britain and Norway the yacht was navigated by her master to Halifax, and thence to the United States, arriving at the port of New York on or about July 6, 1891; that on arrival here the yacht was entered at the custom-house, the bill of sale, previously certified by the American consul at Liverpool, being presented to the collector for record and certification, and that the collector's certificate was endorsed thereon, in accordance with articles 93 to 97 of the Treasury Regulations of 1884, entitling the yacht to the 459
protection and flag of the United States, but not entitling her to engage in commerce (Rev. St., § 2497); that the collector claimed that the yacht was subject to custom duties as an imported article, and that, such duties not being paid, he, on the 27th of August, 1891, by his deputies, took possession of and held her for the payment of such duties until she was arrested by the marshal as above stated.

The libel being filed to recover possession of a vessel alleged to be wrongfully detained, it is immaterial whether at the moment of the filing of the libel, or of the issuing of the original process,
154 the yacht was within the territorial limits of this jurisdiction 460
or in the waters of the adjoining district, for she presently came within the territorial jurisdiction of the court and was there lawfully and regularly arrested under the process. The process was not void merely because when issued the yacht was across the boundary line of this district. The Supreme Court having all the facts upon the record before it, has expressly affirmed the jurisdiction of the court over both the vessel and the parties and its authority to proceed with the cause. The only remaining question is whether the yacht is subject to customs duties. If she is not, the seizure and possession by the collector were illegal, and it is the duty of the court to give the 461
libelant judgment and a writ of possession.

The history of legislation in this country in reference to ships and vessels, as shown by scores of acts in the United States Statutes at Large, leaves no doubt, as it seems to me, that from the beginning ships and vessels have been treated as a subject sui generis, and that

the acts of Congress in regard to them form a complete system by itself, wholly outside of ordinary tariff legislation as respects imported goods, wares, and merchandise. Duties on vessels have always been
462 imposed, but never in those acts or in the same sections of acts that deal with customs duties on goods, wares, and merchandise. They have always been imposed either by independent acts or by independent sections in the same act and by different methods from those applicable to merchandise, viz, duties computed by tonnage. Protection to American industries also, and the development of American commerce and of the American marine, so sedulously studied from the first, have been provided for in ways altogether peculiar to ships and vessels alone; not merely by exacting higher duties on foreign-built vessels than upon domestic ones, but higher duties also upon the
463 155 cargoes brought in foreign bottoms (still the law except where exempted by special treaty stipulation); and, finally, by excluding foreign vessels altogether from American registry, so that no foreign-built ship can become a vessel of the United States, except by a special act of Congress, or take part in the coasting or internal trade of the country. Not a decade has passed since the foundation of the Government during which one or more, often several, changes have not been made in the regulation of the duties to be paid by foreign and domestic vessels, and in the discriminations affecting the vessels of particular countries. These acts are much more numerous than the tariff
464 acts, and show the constant presence of the subject in the mind of Congress.

In view of such a body of legislation evidently forming a system by itself, and covering the subject of duties to be paid to the Government by foreign or domestic vessels coming to this country in the usual course of navigation, and presumptively, therefore, embodying the whole intention of Congress in reference thereto, the usual rule in the construction of statutes would exclude ships and vessels from the purview of ordinary tariff legislation as regards imports of goods, wares, and merchandise, in the absence of any provisions showing a clear intention to include ships and vessels, and thus to impose on
465 them a double duty. Examination of all the tariff acts, including that of October 1, 1890, shows that in not one of them are ships or vessels named in the schedules of imports; nor is there a single phrase under which they can be classed except by a strained and unnatural construction. By the rule of construction above referred to, therefore, and without reference to the practice of the Government for more than a century not to treat vessels coming here in the usual course of navigation as subject to tariff duties on imports, all such vessels should be held subject to such duties only as are
466 156 imposed under the special acts dealing with ships and vessels, and not subject to the acts dealing only with duties on imported merchandise.

While the foregoing general view seems to me quite sufficient for the decision of the cause, the novelty of the subject makes proper, perhaps, a consideration of it more in detail.

Duties upon the yacht are claimed to be due under the customs act of October 1, 1890 (26 St. at L., 567). That act declares, in its

first paragraph, "that there shall be levied, collected, and paid upon all articles imported from foreign countries and mentioned in the schedules herein contained the rates of duty by the schedules prescribed." To come within the act the article must be (1) imported; 467
(2) mentioned in the schedules; and (3) fall within the general scope and intention of this act, rather than within those other acts that provide specially for duties upon ships and vessels. Neither of these conditions seem to me to exist as regards such a vessel as the "Conqueror." She is a seagoing, schooner rigged, screw steamship; 182½ feet long, nearly 25 feet wide, and 13½ feet deep; her measurement is about 372 tons gross, 219⅓ tons net. Her crew consists of twenty-five men. She came to this country in the ordinary course of navigation as a pleasure yacht, duly entered at the custom-house, and presented the bill of sale in conformity with the Treasury Regulations 468
applicable to foreign built vessels purchased by citizens of this country as above stated. She paid no tonnage duty, because section 4216 of the Revised Statutes abolished that duty upon yachts belonging to a regularly organized yacht club of a foreign nation which extended similar privileges to yachts of this country.

1. A vessel arriving in this way is not, in my judgment, an "imported article" within the meaning of the tariff law. The word "imported" has in general the same meaning in the tariff
157 laws that its etymology shows (in porto: to bear, to carry). To 469
import is to bear or carry into. An "imported" article is an article brought or carried into this country from abroad. This yacht was not borne or carried into this country. Vessels are the means or instruments of importation. They are not ordinarily themselves imported. The definition of a vessel in section 3 of the Revised Statutes is "every description of water craft * * * capable of being used as a means of transportation on water." A vessel arriving in the ordinary course of navigation is no more imported, in the ordinary sense of that word, than she is transported. Occasionally small crafts are carried from one country to another on board of larger vessels. When thus transported from one country to another 470
they are imported, and so far may be subject to duties as imports. The present is no such case.

2. Ships and vessels are not "mentioned" by name in any of the schedules or paragraphs prescribing duties. The only paragraphs under which it is claimed they might be brought are paragraph 215, as "manufactures of iron or steel * * * whether partly or wholly manufactured;" paragraph 230, as "manufactures of wood;" paragraph 137, as "beams, posts, building forms, &c., together with all other structural shapes of iron or steel, whether plain or punched, or fitted for use;" paragraph 153, "anchors or parts thereof, of iron 471
or steel, wrought iron for ships, forgings of iron or steel for vessels or parts thereof;" and section 4 of the act, as "articles manufactured in whole or in part, not provided for in this act." Paragraphs 137 and 153 plainly enough refer to the articles in their separate forms; not when found built into, or forming a part of, such a construction as a vessel, which must be treated as a unit. Paragraphs 215 and 230

and section 4 relate only to articles "manufactured;" the first
472 158 imposes a duty of 45 per cent ad valorem; the second, 35 per cent; and the third, 20 per cent ad valorem. The mere etymology of the word "manufactured," that is, something made by hand, might admit of its application to a ship. And in the case of a vessel, though completed, brought into port on board of another vessel as merchandise, and not properly falling within the provisions or the intention of the special acts imposing duties on ships and vessels, I am not prepared to say that the description of it as a "manufactured" article under some of those general clauses, though it may be difficult to say which, might not be sufficient to render it
473 chargeable with duties as an import "mentioned" in the tariff act, as in the case of the "Madge," Treas. Dec., 4960 (March 17, 1882). But in the ordinary use of language a vessel is no more "manufactured" than a house or a cathedral. Ships are "built" or "constructed," and those who build them are known as "shipbuilders," not as ship manufacturers.

Considering the fact that hundreds of objects are specifically named in the tariff acts, many of them of but slight consequence in comparison with ships and vessels; and considering the prominence of ships and vessels as the chief means of all importation, that they are so often presented to the attention of Congress, and that there is not
474 a tariff act but contains some allusion to them, it is not credible that, if it had been the intent of Congress to make seagoing vessels coming to this country in the usual course of navigation subject either to specific or ad valorem duties, they would not have been mentioned eo nomine in some of the tariff schedules, and not left to be covered by such remote and farfetched clauses as manufactures of iron or wood, or "manufactures not otherwise provided for." The absence of apt words affords a strong presumption that vessels coming here in the usual way are not included.

475 159 3. The controlling fact, however, which accounts at once for the absence of ships and vessels from the express provisions of the tariff acts, and for the lack of any apt words in those acts to include them, is the fact first above mentioned, viz, that from the foundation of the Government the duties on ships and vessels have been regulated by acts independent of the customs laws, and under a different system of legislation. From the first, duties on imports and duties on ships and vessels have been always treated as separate and independent subjects. The first act of the first Congress was for its own organization. The second was an act laying a duty on "goods, wares, and merchandise imported" (1 St. at L., chap. 2, p. 24). The very next act, passed July 20, 1789 (1 St. at L., chap. 3, p. 27), provided
476 for duties on ships and vessels. It is enacted that the "following duties shall be and are hereby imposed on all ships or vessels entered in the United States," imposing different rates of duty per ton, viz, (1) on those built and owned here, six cents per ton; (2) on those built here, but belonging wholly or in part to foreigners, thirty cents per ton; and (3) on all other vessels, i. e., those built abroad, fifty cents per ton. This distinction between ships and vessels dutiable at certain rates per ton, and goods, wares, and merchandise imported,

and dutiable at specific and ad valorem rates, has continued to the present hour, and has been recognized in scores of acts. The Revised 477
Statutes, § 4219, enact that "upon vessels entered in the United States from any foreign port there shall be paid duties as follows," specifying various different rates per ton. Sec. 4223 provided that "the tonnage duty imposed on all vessels engaged in foreign commerce shall be levied once a year." By the act of June 19, 1886 (24 St. at L., p. 82, § 11), "a duty of six cents per ton, not to exceed thirty cents per ton per annum," was "imposed at each entry upon all
160 vessels entered from any foreign ports, not, however, to include 478
vessels in distress or not engaged in trade." In the numerous statutes which have regulated the changes in the rate of tonnage duty, and the distinctions made between domestic and foreign-built vessels, these duties are sometimes spoken of simply as "duties on ships and vessels," as in the first act, sometimes as "duties" on the tonnage of ships, or as "tonnage duties on ships," or as a "tonnage tax." The various expressions all signify the same thing. All are "duties" imposed as directly upon ships as the tariff duties are imposed upon merchandise. The two classes of subject are wholly distinct. The tonnage duty is the duty provided to be paid by ships; the tariff duty, by imported merchandise. Each class is governed by 479
its own laws, and neither is designed to pay a double tax.

The reason for the distinction is obvious. Vessels are destined to come and go continually; merchandise to be consumed on shore. Merchandise, therefore, pays duty on its value but once, and once for all. If vessels were dutiable under the same law on their whole value at every entry into port, they would be speedily taxed out of existence and navigation would become insupportable. Vessels, therefore, are taxable at a much lower rate, but payable at every entry or yearly.

There is nothing in the act of 1890, so far as regards the question 480
under consideration, that in any way distinguishes it from prior tariff acts. The words "articles imported," used in the act of 1890, have been use' in several previous acts, and those words have no more extended meaning than the word "merchandise" in the earlier acts, since the word merchandise includes "chattels of every description capable of being imported" (Rev. St., § 2766).

The revenue act of July 14, 1862 (12 St. at L., p. 543), well illustrates the above views. That act in its first fourteen sections imposed duties on imported merchandise, &c. It provided also (do.,
161 p. 557) for duties on manufactures in substantially the same 481
terms as paragraph 215 and section 4 of the act of 1890. The next section imposed duties on ships and vessels as follows:

"Section 15. Be it further enacted, that upon all ships, vessels, or steamers which shall be entered in any custom-house in the United States from any foreign port or place, whether ships or vessels of the United States or belonging wholly or in part to subjects of foreign powers, there shall be paid a tax or tonnage duty of 10 cents per ton * * * in addition to any tonnage duty now imposed by law." Here are the two classes of subjects, viz, "imported merchandise" as one group, and "ships and vessels" as the other, brought side by side in 482
the same act. The different duties and the different modes of impos-

ing them on the two classes are clearly discriminated. No one would seriously contend that vessels liable to a tonnage duty under section 15 of that act could be liable as an imported article to an additional duty under such general words in the prior sections as "manufactures of iron," or "manufactures not otherwise provided for." The manifest intent of Congress to provide independently in section 15 for the duties to be paid by ships and vessels, excludes the prior sections
483 from any application to whatever is covered by the latter. Similar provisions in the act of 1890 can not receive any different construction.

In the case of the United States v. A Chain Cable, 2 Sumner, 362, where a chain cable had been bought in Liverpool by the master of an American vessel to replace an old one worn out, and was landed in Boston without a permit, and claimed to have become thereby forfeited, Mr. Justice Story held that the article, though brought in on board the ship and so imported, was, nevertheless, to be treated as a part of the ship, and not as goods, wares, or merchandise
484 162 within the meaning of the general revenue laws. So in "The Gertrude," 3 Story, 68, Mr. Justice Story, affirming the decision of Ware, J., held that the "tackle, apparel, and furniture of a foreign vessel wrecked upon our shores did not come within the meaning of the revenue laws as imported merchandise."

But for the acts of June 29, 1870 (Rev. St., § 4216), and of June 19, 1886 (24 St. at L., p. 82, § 11), there can be no question that this yacht would have been required to pay tonnage duties like all other vessels coming from a foreign port. She is plainly within the special statutes relating to duties on ships and vessels, and was, there-
485 fore, not within the scope of the general tariff upon imported merchandise.

By the acts of 1870 and 1886, above referred to, Congress has exempted such yachts, not engaged in trade, from the payment of tonnage duties. The effect of this was not in any degree to extend the scope of the tariff act concerning imports, so as to make it applicable where it was not applicable before. The plain intent of Congress was to relieve such yachts from the prior burden of tonnage duty; not to increase their burdens or to add any new ones. The reasons for it, if I am rightly informed, were for the improvement of navigation by the development of the finest models, both for speed
486 and in the various forms of naval architecture, for free intercommunication between yachtsmen of different countries, their invitation to our shores, and the advantages to our own yacht builders likely to result therefrom.

4. It is urged, however, that though foreign vessels entering at our ports may not in general be subject to duty as imports, the case of the "Conqueror" is distinguishable from them in two respects: (1) That the former are treated by international comity as a part of the territory of the country to which they belong, and being
487 163 here only temporarily are by comity not considered as imports; (2) that the "Conqueror" presented her bill of sale at the custom-house and obtained the certificate of the collector thereon,

entitling her to the protection and flag of the United States, and that this act made her an import by change of domicile, and subject, therefore, to import duties.

If, however, the views previously expressed are correct, none of these suggestions have weight. They do not change the fact that the yacht was navigated to this port as a seagoing vessel, and hence liable to duty, if at all, under the shipping laws, and not under the laws applicable to imported merchandise. The circumstances stated do not widen the scope of the tariff law, nor change the class to 488
which the yacht belongs, nor transfer her from the one system of legislation to the other. After the bill of sale was made, she was none the less governed by the shipping laws alone; and but for the acts of 1870 and 1886, she would have remained subject to tonnage duties precisely as before, whether the bill of sale was presented and certified at once or not till long afterwards. The certification has not the effect ascribed to it. It contributed nothing to give the yacht an American domicile, or to make her American property. She was made American property months before by the bill of sale, and her domicile followed that of her owner. The certification did not make her a "vessel of the United States," nor give her the general rights or 489
privileges of vessels of the United States (The Merritt, 17 Wall., 582). She could not enter into the foreign trade, nor into the internal or coastwise trade of the country (§§ 4131, 4311, 2497). The only use of the certification was to serve as "proof of American ownership," for her convenience in navigation as a pleasure yacht, and to absolve her from the payment of "light money." (Rev. St., 4225 and 4226; "The Miranda," 47 Fed. Rep., 815; Sleight v. Hartshorn, 2 Johns, 531, 545.) She had already once before entered this
164 port under the libelant's ownership and paid "light money," 490
not having certified papers. If she was not liable to import duties before the certification, when navigated by the libelant as owner, there is nothing in the tariff act or in § 4226 that makes the payment of import duties either a condition or a consequence of such certification; and without that there can be no additional duties imposed.

As regards the other suggestion, it is not correct that foreign private ships are usually treated as parts of the territory of the country to which they belong. It is only public vessels that are entitled to that exemption. As to private foreign vessels the contrary is the rule. They are subject to all the laws and regulations enacted in 491
regard to them by the country which they enter. It is under such laws that foreign vessels are required to pay tonnage duties, pilotage fees, and light money. That import duties are not exacted of such vessels is not because of any legal fiction or international comity, but because they are not within the scope of the tariff laws on imports, and are dutiable according to the shipping laws alone. Had foreign vessels been within the scope of the tariff law on imports it is certain that the Government would not have forborne for a century past to collect import duties on such vessels, either by reason of their temporary stay, or of any notions of international comity. 492

In my judgment nothing in the case removes this yacht from the domain of the laws specially enacted for ships and vessels, as to the dutiable charges thereon; and as by these laws she is released from the payment of the duties ordinarily imposed on vessels, without being charged with any other duties or made subject to the general tariff law on imported merchandise, her detention for customs duties was illegal, and the libelant is entitled to a decree for possession, with costs and damages.

January 28, 1892. [2677 B]

493 165 District court of the United States for the southern district of New York.

FREDERICK W. VANDERBILT
against
YACHT "CONQUEROR" AND J. Sloat Fassett.

On motion of Root & Clarke, proctors for the libelant, and after
494 hearing the district attorney for the claimants and respondents,

Ordered, That the yacht "Conqueror," her tackle, apparel, and furniture, be released to the libelant upon the libelant's filing a stipulation in the sum of seventy-five thousand dollars, with one or more sureties satisfactory to the clerk, conditioned for the safe return of said yacht to the custody of the court, should this court or any appellate court hereafter so order.

Further ordered, That the marshal forthwith put the libelant in possession of said yacht, her tackle, apparel, and furniture, upon
495 receiving a certificate from the clerk of the filing of such stipulation, and upon being paid his lawful fees.

Dated New York, January 29, 1892.

ADDISON BROWN.

(Endorsed:) U. S. district court. Frederick W. Vanderbilt against Yacht "Conqueror" and J. Sloat Fassett. Order to release yacht on bail. Root & Clarke, proctors for libelant, 32 Nassau street, New York City, New York.

496 166 District court of the United States for the southern district of New York. In admiralty. Filed and recorded the 4th day of February, 1892.

Stipulation for Value.

Entered into pursuant to the rules and practices of this court.

497 Whereas a libel was filed on the 1st day of September, in the year of our Lord one thousand eight hundred and ninety-one, by Frederick W. Vanderbilt against The steam yacht "Conqueror," her engines, &c., and against J. Sloat Fassett, for the reasons and causes in said libel mentioned.

And whereas the said yacht is now in the custody of the U. S. marshal, under the process issued in pursuance of the prayer of said

libel; and whereas, by an order entered herein on the 29th day of January, 1892, it was ordered that the said steam yacht, her tackle, &c., be released to the libelant upon the libelant's filing a stipulation in the sum of seventy-five thousand dollars, with one or more sureties satisfactory to the clerk, conditioned for the safe return of said yacht to 498
the custody of the court, should this court or any appellate court hereafter so order.

Now, therefore, the condition of the stipulation is such, that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court, or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Root & Clarke, esquires, proctors
167 for the libelant of said steam yacht, abide by and perform the 499
above condition, then this stipulation to be void, otherwise to remain in full force and virtue.

F. W. VANDERBILT. [L. S.]
CHAUNCEY M. DEPEW. [L. S.]

Taken and acknowledged this 3d day of February, 1892, before me.

[L. S.] ALEX. GILCHRIST, Jr.,
Notary Public, Kings & N. Y. Cos.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Chauncey M. Depew, party to the above stipulation, being duly 500
sworn, did depose and say that he resides in the southern district of New York; that he is worth the sum of one hundred and fifty thousand dollars, over and above all his just debts and liabilities.

CHAUNCEY M. DEPEW.

Sworn to this 3d day of February, 1892, before me.

[L. S.] ALEX. GILCHRIST, Jr.,
Notary Public, Kings & N. Y. Cos.

Approved. 501

EDWD. MITCHELL,
U. S. Atty.
SAML. H. LYMAN,
Clerk U. S. Dist. Ct.

168 District court of the United States for the southern district 502
of New York.

FREDERICK W. VANDERBILT
against
YACHT "CONQUEROR," HER TACKLE, &C., and J. Sloat Fassett. } In admiralty.

This cause having come on to be heard upon pleadings and proofs, 503
and having been argued by the advocates of the parties respectively;

And the court, on due consideration of the premises, being of opinion that the libelant is entitled to be restored to the possession of said yacht, and to recover from the respondent, J. Sloat Fassett,

the damages which he has suffered by reason of the matters set forth in the libel, together with the costs and expenses of this suit to be taxed:

Now, on motion of Root & Clarke, proctors for the libelant,

It is ordered, That the libelant's damages be assessed by S. H.
504 Lyman, U. S. commissioner, who shall report his conclusions with the evidence to the court, and that the entry of a final decree herein be reserved till the coming in of the report, or till further order.

Dated New York, January 29, 1892.

ADDISON BROWN.

(Endorsed:) U. S. district court. Frederick W. Vanderbilt against Yacht "Conqueror" and J. Sloat Fassett. Order of reference to clerk to assess damages. Root & Clarke, proctors for libelant, 32 Nassau street, New York City, New York.

505 169 United States district court, southern district of New York.

FREDERICK W. VANDERBILT *vs.* THE YACHT "CONQUEROR," HER tackle, &c., and J. Sloat Fassett.	Before S. H. Lyman, esq., U. S. commissioner.

506 NEW YORK, *May 24th*, 1892.

Appearances: Messrs. Root & Clarke (by Mr. Clarke), for the libelant; Henry C. Platt, esq., for the respondent, Fassett.

SAMUEL HOLMES, called as a witness on behalf of the libelant, being duly sworn, testified as follows:

Direct examination by counsel for the libelant.

By Mr. CLARKE:

507 Q. What is your business, Mr. Holmes?

A. A steamship broker.

Q. And how long have you been engaged in that business?

A. About 14 years.

Q. Do you have anything to do with buying, selling, and chartering, or leasing pleasure yachts?

A. Steam yachts, not sailing yachts.

Q. You have had to do with that business?

A. Yes, sir.

Q. During the 14 years that you speak of?

A. Yes, sir.

Q. You know the yacht "Conqueror," Mr. Vanderbilt's yacht?

A. Yes, sir.

508 170 Q. Have you personally been aboard of her?

A. I have.

Q. And examined her?

A. Yes, sir.

Q. Please tell us what, in your opinion, was the fair and reasonable value of the use of that yacht "Conqueror" from August 27th, 1891, to February 3rd, 1892.

A. I should set it down about $15,000.

Q. How much per month?

A. About $3,000.

Q. Who would pay the wages of the crew, the owner or the charterer?

A. The charterer.

Q. And the food of the crew?

A. The charterer; that would be for the bare boat.

Q. That would be for the bare boat?

A. Yes.

Q. So that such items as wages and food of the crew, the sundry 509
running expenses, wharfage, towing, heating, etc., would be borne by the charterer?

A. Entirely; yes, sir.

Cross-examination by counsel for the respondent.

By Mr. PLATT:

Q. Mr. Holmes, did you ever charter a vessel of this size and tonnage—a steam yacht?

A. Yes, sir.

Q. When?

A. I chartered a boat this size about three or four years ago.

Q. For about this amount, $3,000 or $4,000 a month? 510

A. No, sir; it was a little less.

Q. How much?

A. It was for about $9,000.

Q. For how long?

A. It was for a winter trip to the West Indies, Mexico. The circumstances were a little different than this, though.

Q. What, in your opinion, would be a fair sum for the use of a yacht of this kind from August 27th to September 29th, 1891—about a month?

A. I would set it down for a short period—it would run about $100 a day. I do not know how many days that would be.

Q. About $100 a day?

171 A. Yes; I reckon five months in the neighborhood of 511
$15,000; practically $3,000 a month.

Q. Charterer paying the expenses?

A. Yes, sir; that is, the bare boat.

By Mr. CLARKE:

Q. By charterer, you mean the person who hires?

A. Yes.

Q. That is, the bare boat?

A. Yes, sir; the bare boat.

OWAIN L. HUGHES, called as a witness on behalf of the libelant, being duly sworn, testified as follows:

512 *Direct examination by counsel for the libelant.*

By Mr. CLARKE:

Q. What is your business?

A. Yacht broker.

Q. How long have you been in the business?

A. 13 years; nine as an employee, and then as my own business.

Q. And during that time have you been familiar with the purchasing and letting of steam yachts?

A. It has been the nature of my business throughout the entire time.

Q. Are you acquainted with Mr. Vanderbilt's yacht, the "Conqueror?"

A. Yes.

513 Q. Have personally been aboard of her and examined her?

A. Yes, sir.

Q. You may state what, in your judgment, was the fair and reasonable value of the use of the "Conqueror" from August 27th to February 3rd, 1892.

A. $100 a day, sir.

Q. Who pays the expenses, the wages of the crew?

A. The party who hired the boat would pay everything, of whatsoever nature it may be.

Q. You put it down at $100 a day?

A. For the use of the boat only.

514 172 *Cross-examination by counsel for the respondent.*

By Mr. PLATT:

Q. Do you know what the expense would be of running such a boat?

A. Approximately?

Q. Yes.

A. The wages of the crew would run from fifteen to $1,800 a month; I do not know exactly, not knowing exactly what they carried; but it would be about that; then they would have to be fed, which would be 50 to 60 cents per day per man.

515 THOMAS MANNING, called as a witness on behalf of the libelant, being duly sworn, testified as follows:

Direct examination by counsel for the libelant.

By Mr. CLARKE:

Q. What is your business?

A. Yacht broker.

Q. How long have you been in the business?

A. Since 1873, 19 years.

Q. During that time you have become familiar with purchasing, selling, and letting of steam yachts?

A. Yes, sir.

Q. Do you know Mr. Vanderbilt's yacht, the "Conqueror"?

A. Yes, sir.

Q. You have been aboard of her and personally examined her? 516

A. Yes, sir.

Q. Give us your judgment as to what the fair and reasonable value of the use of the "Conqueror" was from the 27th of August, 1891, to the 3rd of February, 1892.

A. About $20,000; that is, for the boat itself, without the crew.

Q. And without any other expenses, such as food of crew, or wharfage, or sundry running expenses?

A. Nothing but the boat, and its equipments.

Q. Do you figure at a rate per day for that time, or a round sum?

173 A. I am figuring for that is the rate I could have 517 gotten for it at that time, or about that time.

Q. You think you could have gotten $20,000?

A. I think I could have gotten a little more at that time—yes, I could have gotten more at that time.

Q. Was there a demand for such yachts?

A. There is more or less demand for those large boats, but a great difficulty in getting them; almost an impossibility.

No cross-examination.

JOSEPH E. WOOD, called as a witness on behalf of the libelant, being duly sworn, testified as follows: 518

Direct examination by counsel for the libelant.

By Mr. Clarke:

Q. Captain Wood, on what day was it that the collector took possession of the yacht?

A. 27th of August, 1891.

Q. And what day did the marshal of this court release her to you?

A. February 3rd, 1892.

Q. Where did the collector keep the yacht from the time he took possession of her till the marshal took possession of it from him?

A. The collector had the yacht lying off Stapleton, Staten Island, and then removed her to Erie Basin, where the marshal took possession. 519

Q. How long did she lie in the stream off Stapleton?

A. About a month.

Q. And then she was transferred to the Erie Basin?

A. Yes, sir.

Q. And there she lay until the marshal restored her?

A. Yes, sir.

Q. What was done with the crew during the time from August 27th, 1891, to February 3rd, 1892?

A. The crew were employed keeping the ship in order.

Q. I ask you for the whole period?

A. For the whole period, August 27th to February 3rd, 1892, they were employed taking care of the yacht.

520 174 Q. Did you keep the whole crew all the time?

A. No.

Q. I want to know what the periods were; how many of the men were kept during the various times?

A. The full crew, or about the full crew that were on board the yacht when she was seized, were kept until the end of September; then all were paid off that could be dispensed with, and a few kept on, until the 10th of October, when all that were not needed to take care of the ship were discharged.

Q. As I understand you, then, at the time of the transfer to the Erie Basin you began to get rid of your crew?

521 A. Yes; just as quickly as possible, as soon as the ship was in order.

Q. And by the 10th of October you had gotten rid of all but those that were needed to take care of her while she lay at the dock?

A. Yes, sir.

Q. Was it necessary to keep the full crew on the vessel while the vessel was lying in the stream?

A. It was.

Q. Were all the men that could be dispensed with, dispensed with as quickly as possible after arriving at the dock?

A. They were.

Q. And those that were retained were only so many as were necessary to look after the boat as she lay at the dock?

A. Yes, sir.

522 Q. Now, captain, I wish you would tell me how much the total amount paid to the officers and crew of the yacht was from August 27th, 1891, to February 3rd, 1892?

A. $3,588.61.

Q. Give me the amount paid the crew for August, the four days in August?

A. $175.98.

Q. How did you get at that amount?

A. By taking the amount of the pay-roll for the entire month and apportioning it for the four days.

Q. What was the amount paid in September?

A. $1,101.17.

Q. And in October?

A. $305.

Q. And November.

A. 210.

523 175 Q. And December?

A. $210.

Q. January?

A. $210.

Q. And the three days in February?

A. $21.72.

Q. These items per month that you have given, do they include your own pay?

A. No.

Q. Your own pay was how much?

A. At the rate of $2,500 per annum.

Q. That, however, is included in the $3,588.61?

A. It is.

Q. Do those items that you have given include what was paid for night watchmen?

A. It does; the bill includes it.

Q. But the items which you have already given?

A. No.

Q. How much in addition to what you have already given did you 524
pay for night watchmen?

A. $252.

Q. Have you the vouchers for all these various items?

A. I have.

Q. These wages that you have paid were at the same rates that had been paid before the seizure of the yacht, were they?

A. Yes; in some cases a little less.

Q. They were none of them in excess?

A. None of them in excess.

Q. And all of them were necessary, were they?

A. All were necessary.

Q. Now, you may give me the items of feeding crew. First, give 525
me the aggregate amount from August 27th, 1891, to February 3, 1892.

A. $1,251.19.

Q. Give it to me by the month.

A. Total cost of feeding crew from August 27th to the 31st, as per bill No. 9, $69.00; month of September, $425.40; total cost of feeding crew, and board allowances for crew, as per bill 11, $208. Board allowances for November, $175; December, $178; January, 1892, $178, and for three days in February, $17.79.

Q. This includes the board of the crew and men, and also the board of the officers, does it?

A. Yes.

176 Q. I see "Board allowances" there. What does that 526
mean?

A. It is a certain amount that is allowed each man wherewith to pay his board. He boards ashore from the yacht, not living on board the yacht.

Q. What was that for?

A. For the chief officer, $45 per month; for the engineers it was $1.00 per day—second engineer; for the quartermaster and firemen on board, $20 per month; for myself, $2.00 per day.

Q. Are there any board allowances before the crew were discharged?

A. No board allowances before the crew were discharged. The amounts set down against the crew, however, was an estimate, a fair 527
estimate of the cost.

Q. That is for the months of August and September?
A. For August and September.
Q. What was the basis of the estimate?
A. 60 cents per man per day.
Q. Is that a just estimate?
A. I think it is a just estimate; it is less than the cost of feeding our people on the "Conqueror," the way we do it.
Q. It is?
A. Much less.
Q. That is, the amount you allowed in calculating those figures for the four days in August and for September, is actually less than the expense of feeding those men on board?
A. It is.
528 Q. And taking the matter generally, is that a fair allowance to your knowledge?
A. I think it is.
Q. Was Mr. Vanderbilt at any other expense, in respect of the crew, between August 27th and February 3rd?
A. Yes; I think there was an expense for medical attendance among the men. Medicine for them, as well as laundering bills.
Q. What were those items?
A. The medicine account for a seaman that was sick, $6.10; doctor attending the same man was $24; laundering account for that month was $26.86; total, $56.96.
Q. Did you pay anything for wharfage during the detention of the yacht?
A. I did.
529 177 Q. From what period to what period?
A. From the 27th, on or about the 27th of September, until the 3rd of February.
Q. And how much?
A. $260, I think.
Q. Was that a necessary expense?
A. It was; the expenses were paid since, just the same.
Q. The rate is just the same as you paid since the release?
A. Yes; just the same.
Q. Did you pay anything for moving the yacht—towing the yacht from where she lay off Stapleton—to the Erie Basin?
A. We did.
Q. How much?
A. $25.
Q. Was that a necessary expense?
A. It was.
Q. While the vessel was detained, was she heated?
530 A. Yes.
Q. Was that necessary?
A. It was.
Q. Why?
A. To keep the dampness out of the ship, and the extreme cold from doing any damage to the woodwork, or anything about the ship.
Q. Or machinery?

A. Or machinery; yes.

Q. How much was paid for heating?

A. $68.40. That includes the cost of some temporary heaters that we put there.

Q. That includes the cost of some heaters. What has become of the heaters?

A. Heaters are on the dock there now.

Q. How much do the heaters that are in that item come to?

A. $51.05 is the cost of the heaters.

Q. What are they worth now?

A. Nothing to us. I can get no one that will take them at all; 531
have to pay the cost of taking them away.

Q. Have you tried to sell them?

A. I have.

Q. Then, out of the $68 for heating, $51 was the cost of the heaters?

A. Yes.

Q. You say you have tried to sell them, and nobody will buy them?

A. They might be worth something next winter, next fall, but at present they are of no market value. Of course, included in that cost of heating, there is nothing of the ship's fuel that was used; that would have to be estimated; that wasn't worth while. It was only the actual cash payment that we entered.

178 Q. I see you have here in your schedules an item shifting 532
coal. Can you explain what shifting coal means? Explain what it means and why it was necessary.

A. Just previous to the yacht being seized her bunkers were filled with coal, and on account of the seizure we were not able to burn that coal, and after being released it was necessary to make repairs and alterations, &c., in the yacht, which necessitated the removal of that coal. Of course, had we been in a normal state when she laid up, the coal bunkers would be empty, and in order to do the alteration it was necessary to move that coal.

Q. What was the expense?

A. $146.50.

Q. Have you prepared the schedules of these various items of 533
expenses here?

A. I have.

Q. Which I have been using in asking you questions?

A. Yes; I had a very economical way of moving this coal. Instead of hiring a lighter and putting it on board, which would have been some $300, I just put it on deck, and shifted the coal in the bunkers, and then put it down, which was very much less cost.

Q. These papers which you have prepared show these items. The first paper is a summary, showing the total amount of expenses during the detention to be $5,396.66, and that refers to Schedules A, B, C, D, E, F, and G, which are annexed?

A. Yes.

Q. And I noticed that in the schedules there is a column headed 534
vouchers, and that indicates, I take it, that you have a voucher for each one of those items where it is filled out?

A. Yes.

Q. Where there is no entry under the head of vouchers, that indicates that you haven't any voucher. Is that right?

A. Yes.

Q. Those vouchers are here, and ready to be produced, are they?

A. Yes, sir.

(Counsel for libelant offers in evidence the schedule.)

535 179 Admitted subject to the exception of respondent's counsel to any item, after counsel has examined the schedules.

(Marked Libelant's Exhibit A, of this date.)

Cross-examination by counsel for the respondent.

By Mr. PLATT:

Q. Captain, what would have been the expense of the officers and the crew of this vessel from August 27th, 1891, to February 3rd, 1892?

A. Had she been in commission?

536 Q. Yes?

A. I have never estimated that. I should have to go into figures a little (referring to pay roll). I will include my own salary.

Q. Everything—every necessary expense.

A. Just the pay and victualing?

Q. Yes, all the expenses necessary to run the yacht?

A. The cost would have been about $3,500 per month total running expenses.

Q. Who brought this vessel from Stapleton up to the Erie Basin, in the latter part of September—about September 29th?

A. It was removed at my request. The customs authorities gave permission to move the yacht there, and it was done under direction of the customs authorities. I employed the tug to move her, and it

537 was done under the direction of the customs officers. The custom authorities, I think, detailed a man.

Q. At your request?

A. Yes, sir; furthermore, it was at my request that it was employed.

Q. Were you present, and did you know about the time when the marshal took possession of this vessel from the collector?

A. Yes.

Q. Was that on the same day that she arrived at the Erie Basin?

A. I think not. Was it on the 29th? I think we got there on the 27th. I think this was on the 29th.

Q. The marshal took possession of her on September 29th?

A. Yes.

538 180 Q. Took her away from the collector?

A. Yes.

Q. So that she was in the possession of the collector from August 27th to September 29th?

A. Yes.

Q. And after that in the possession of the marshal?

A. And after that in the possession of the marshal.

(It is admitted that the yacht was released on February 3rd, 1892, by the marshal to the owner.)

Q. Did you have charge and control of this vessel after September 29th?

A. No.

Q. After that you were allowed by the marshal to look after the yacht, were you? 539

A. Yes, I was appointed by him a deputy marshal, and allowed to go on board the yacht.

Q. Appointed a deputy marshal by Marshal Jacobus?

A. Yes, and in that way I was allowed to go on.

Q. After September 29th, in that way you kept charge?

A. No, because they had an officer there who really had authority over me. I had no authority over the yacht any further than he allowed me on board.

Q. You were the master of the vessel?

A. Yes.

Q. This yacht was exclusively used for pleasure; a pleasure yacht engaged in no trade?

A. No trade. 540

Q. Did the marshal permit you to make these repairs on the vessel?

A. No; no repairs were made.

Q. Those repairs were made afterward?

A. Yes.

Q. And was the coal still there when the yacht was delivered to you?

A. Yes.

Q. So that this shifting of the coal was done after possession had been delivered by the marshal?

A. Yes.

Q. Were stores kept on board the yacht during that time?

A. No; some were; about all we have got; some wine, and so on.

181 Q. The stores remained on until about September 30th? 541

A. Yes, sir.

Q. When the full crew was paid off?

A. Yes.

Q. And after that the crew lived on board the vessel?

A. Yes; some of those men that came over for a few days.

Q. And they lived out of the stores out of the vessel?

A. Not all of them. Those who were to be permanently retained received at once their monthly allowance, and boarded themselves ashore on their allowance.

Q. And has the vessel remained there at Erie Basin ever since February 3rd?

A. She has remained in the same berth, until about two weeks ago, when she went into the dock. She is in the same place now. 542

(Counsel for libelant offers in evidence the evidence which was produced on behalf of the libelant in the case in chief, for the purpose of this proceeding.)

(Counsel for the respondent offers in evidence the evidence which was produced on behalf of the respondents in the same proceedings.)

Adjourned to Thursday, May 26, 1892, at 11 a. m. 543

NEW YORK, *May 26th*, 1892.

Met pursuant to adjournment. Present, Mr. Clarke and Mr. Platt.

Respondent objects to the allowance of items of expenses claimed by libelant to be included in the amount of damages in this
544 182 proceeding, as not being within the proper rule of damages to be assessed in this case:

1. Wages account, as shown in Schedule A of Libelant's Exhibit A, $3,589.61.

2. Food account in Schedule B of said exhibit, $1,251.19.

3. Sundry expense account, Schedule C, $56.96.

4. Wharfage account, Schedule D, $260.

5. Towing, Schedule E, $25.

6. For heating, Schedule F, $68.40.

545 7. Shifting coal, Schedule G, $146.50. Total, $5,395.66.

As to the wages account, the respondent claims that there was no additional expense to crew caused by the detention. In fact, the expense of the crew was less than if there had been no detention. The collector had charge of the vessel from August 3rd, 1891, to September 29th, 1891, and any services rendered by the crew or officers on board of the vessel during that period were entirely voluntary and unnecessary, because the vessel was in charge of the collector of the port. The marshal had possession of the vessel from September 29th to February 3rd, under process of the court. It was his
546 duty to take charge of her. He was entitled to his legal expenses and commissions for so doing. All expenses claimed here by the libelant as paid by him to crew or officers or other matters, were entirely voluntary and unnecessary, the marshal being the only one who had any right to take charge of the vessel during that time.

There is a particular objection to this charge of $146.50 for shifting coal. That appears to have been done some time after February 3d, 1892, after the vessel had been delivered to the owner. There is a particular objection, also, to heating the yacht, $68.40,
183 most of which is the price of a heater or heaters, which are
547 still owned by, as appears here, and in possession of the owner.

It does not appear that there was any contract of hire of this crew, engineer, or officers, or entire force on the vessel for any stated period or term. It does appear that they were paid and hired by the month. If so, they could have been discharged at the end of any month, and the expenses of the crew and force as claimed here by the libelant were therefore wholly gratuitous and unnecessary, and not a proper charge against the respondent. All expenses for the care and custody of the vessel while in charge of the marshal are included in the
548 marshal's fees and commissions, which are alone the measure of damages in that respect as against the respondent. The respondent claims that the only measure of damages in this case should be the reasonable value of the use of the vessel during the time of her detention. So far as the respondent is concerned as collector of the port, his detention of this vessel commenced on August 27th and

ended on September 29th, when she was taken from his custody by the marshal. The measure of damages in this case is, perhaps, the interest on the value of the yacht for the period of her detention.

JOSEPH E. WOOD, recalled by libelant.

By Mr. CLARKE:

Q. With reference to the expenses in the account that has been 549
put in evidence, were any of them, and if so which, incurred at the request of the United States marshal?

A. None in this account.

Q. How about the wharfage?

A. I engaged the wharfage there for the yacht, but the marshal assumed that he would pay the wharfage, because he went to the parties when the yacht was discharged to get the bill. In the meantime I had paid the bill monthly, and then it was proposed for me to give him the bill of wharfage and he would refund me. For some reason that was not done.

184 Q. You had engaged the quarters at the wharf before the 550
marshal took possession?

A. Before the marshal took possession.

Q. When the collector brought her over there?

A. Yes, sir.

Q. At whose request?

A. On my own responsibility, acting for Mr. Vanderbilt.

Q. There was no formal request for anybody?

A. No, sir.

Q. But when the collector moved her over there you found quarters for her?

A. Found the quarters before we moved her.

Q. You may state whether the matter of wharfage was an expense which the marshal would have to pay if you had not paid it. 551

A. He certainly would have.

Q. You may state whether the rate of wharfage was the usual rate which you paid.

A. Yes; it was the usual rate. It was the cheapest wharfage I could get.

Q. Would the marshal have had to employ the men that you kept to look after the vessel, or other men, if you had not done it?

A. Yes; he would have had to employ a certain number of men to attend to the vessel.

Q. You kept no more than were necessary for the proper watching and oversight of the men?

A. Yes.

Q. And those men were in addition to the men that the marshal 552
himself actually had there?

A. They were.

Q. How many men were there?

A. Four and the night watchman.

By Mr. PLATT:

A. Can you tell what necessity the marshal had for the men in the engine department?

A. To keep the engines clean.
Q. Did the marshal have all of those men?
A. That was for keeping the engine in order and cleaning it; for laying it up.

553 185 By Mr. CLARKE:

Q. Up to the 10th of October?
A. Yes.

By Mr. PLATT:

Q. Did the marshal employ any of those men?
A. No, not directly; he appointed them as deputy marshals.
Q. All of them?
A. All of those that were kept after the 10th of October.
Q. What men did the marshal have there?
A. C. N. Unsworth, Harry Bales, W. Evans, Jas. Keith.
Q. Those were the four that he appointed deputies?
A. As well as myself.
Q. Those were all?
554 A. Those were all.
Q. And he appointed those deputies on or about what date?
A. I don't remember the date. The date of the seizure—the date that he took possession of her. I think that was in October, was it not? Whatever date it was.
Q. When the marshal took her away from the collector at Erie Basin he made those appointments?
A. Yes.
Q. And after their appointment as deputy marshals, your account here contains the wages paid to them by Mr. Vanderbilt, through you?
A. Yes, sir.
555 Adjourned to Thursday, June 2nd, 1892, at 11 a. m.

556 186 NEW YORK, *June* 2, 1892.

Met pursuant to adjournment. Present, Mr. Clarke and Mr. Platt.

JOSEPH E. WOOD, recalled by libelant.

By Mr. CLARKE:

Q. Was the full crew on board of the yacht "Conqueror" at the time of the seizure by the collector?
A. With one or two exceptions.
Q. The names of the crew and their rate of wages appears in the
557 schedules that have been put in evidence here, do they not?
A. They do.
Q. Upon what terms were you employed as master of the yacht?
A. By the year.
Q. When did your term begin?
A. The third of April, 1891.
Q. At a salary of——
A. $2,500 per annum.
Q. The other members of the crew were employed how?

A. By the month.

Q. Beginning at the first of the month?

A. I don't remember for that month. I think it is shown by the schedules.

Q. By the schedules we have put in evidence in this case?

A. I don't think that that shows when they were employed. It gives the number of days they were employed during that month. 558

Q. They were actually under employment during that month?

A. Yes, sir.

Q. Do the schedules show the time for which they were hired?

A. No; the rate of wages is per month.

Q. Can you tell from any papers that you have got here when the month of any one of them would expire?

A. No. I suppose in reality, according to the regulations, we could pay them off at any time during the month.

Q. Any of the men except yourself?

A. Except myself.

187 Q. So that the question of employment for a given time 559 is a question purely of the necessity of the employment, and you were not under any contract obligations to keep them any longer than was actually necessary?

A. No. Our regulations specified that either party could terminate the agreement at any time with the exception of myself.

Q. You had a special agreement?

A. Yes, sir; he could discharge me at the end of the current year if he chose to do so.

Q. Your employment for this service began in April, 1891?

A. Yes, sir.

Q. When the collector took possession of the yacht in August, 1891, how many men did he put on board? 560

A. One.

Q. How many men did he keep on board down to the time that the marshal took possession?

A. One.

Q. Up to the time that the yacht was transferred from the stream at Stapleton to the Erie Basin were all the men that you kept in the crew necessary to take care of it?

A. Yes, sir; I so considered it.

Q. What was the character of the place that the yacht lay in as a steady anchorage?

A. It is considered a good anchorage.

Q. What sort of a place is it for the fall storms?

A. No ship is secure in any stream, no matter how good. It is 561 necessary to have a crew on board to have it safe.

Q. Was the yacht transferred to the Erie Basin at your request?

A. Yes, sir.

Q. You don't mean by that that it was not done under the collector's order?

A. No.

NOTE.—Counsel for the libelant calls attention to the prohibition proceedings in the Supreme Court in evidence, in which a copy of the

order is set out in the petition of the collector for the writ of prohibition, a copy of the order transferring the vessel from the stream to the Erie Basin.

562 188 Q. As soon as she went into the Erie Basin, September 29, did you then take steps immediately to get rid of the crew?

A. Yes, sir.

Q. As I understand you, from that time down to the 10th of October you discharged the men just as fast as you could get rid of them consistently, to prepare the vessel for being laid up?

A. Yes, sir.

NOTE.—Counsel for the libelant states that the papers in evidence show that the marshal took undisputed possession of the yacht under the third process of the court, and excluded the collector's officer on the 8th of October.

563 Q. How many men did the marshal appoint to have possession of the yacht from the 8th of October up to the time when you got possession of it again?

A. Only one.

Q. Was that one alone sufficient to take care of her?

A. No.

Q. Did you keep aboard or employ in connection with the yacht any more men than you would have kept if she had been laid up and not under seizure?

A. No.

Q. You merely kept the same men who would have been necessary to take care of her had there been no seizure?

A. Yes, sir.

564 Q. And the marshal's man, the single man that had been put aboard the 8th of October, when he put the collector's officer ashore, would he have been capable of taking care of her during the winter?

A. No.

Q. Did the marshal or the collector at any time, from August 27 to February, offer to run things on their own account, to take care of the property independently of the members of the crew and of yourself?

A. No; he at once appointed myself and the other members of the crew to assist in taking care of the yacht.

Q. You refer to the marshal?

A. Yes, sir.

565 189 Q. So far as the collector was concerned, did he ever offer to put any men on board of the yacht to take care of her, if you had put the crew ashore?

A. Never.

Cross-examination by counsel for the respondent.

By Mr. PLATT:

Q. Did you not offer the services of yourself and crew to the collector to take care of the yacht while she lay in the stream?

A. No.

Q. Who requested you and the crew to remain on board after the collector's seizure of the yacht?

A. No request was made. 566

Q. Neither the collector or his subordinates made any such request, to your knowledge?

A. No.

Q. When the marshal took possession of her, then did you offer the services of yourself and crew to take care of the vessel?

A. Yes, sir; after our crew were paid.

Q. Who had the hiring of the crew; was that part of your duties?

A. One of my duties; yes, sir.

Q. When you anchored at Stapleton, and before the seizure by the collector, what was your intention to do with this vessel?

A. The yacht was anchored there with the direct intention of plac- 567
ing her where the collector could make the seizure, which he had informed Mr. Vanderbilt he was going to make.

Q. Had you any previous notice that the collector intended to seize the vessel?

A. We had.

Q. From whom did you receive such notice?

A. Mr. Vanderbilt told me; I had heard it from other quarters, as well.

Q. Then you brought the vessel there on purpose, so that the collector might take possession of her?

A. Yes, sir.

190 Q. Was it not intended, within a very brief time, to take 568
a trip or cruise on the vessel?

A. It was. We would have gone to Newport that same day had it not been for that.

Q. Was it expected at that time that the detention of the vessel would be anything more than a temporary one?

A. No.

Q. And after that temporary detention it was intended to go on some trip?

A. Yes.

Q. When was that idea of taking the trip that season abandoned?

A. I think about the end of September.

Q. Near the time when the marshal got possession of her?

A. Yes.

Q. And then, after that idea was abandoned, she was brought up 569
to Erie Basin?

A. Yes, sir.

Q. At your request, by order of the collector?

A. Yes.

Q. And there put into winter quarters, I suppose?

A. Yes.

Q. Then up to the time, or about the time, that the marshal took possession of her, the full crew was kept aboard, with the expectation that their services would be required on the trip or cruise?

A. Yes; as well as to take care of the yacht while lying there.

Q. Would it take as many men to take care of the vessel out of commission as when in active service? 570

A. That would depend upon the position the ship was in.

Q. It was after the intention of taking the trip in the vessel had been abandoned that the crew, or some of the crew, were discharged?
A. Yes.

Redirect examination by counsel for the libelant.

By Mr. CLARKE:

Q. Did you have any notice that the collector was going to take possession of the yacht previous to coaling up at Communipaw?

571 191 A. I don't remember exactly at what time, whether it was immediately after or immediately before.

Q. You don't remember one way or the other?

A. I don't remember one way or the other. It may have been before. Anyway, it would have made no difference, because we did not suppose the detention would be anything more than temporary.

572 *Summary.*

Total Schedule A, wages account	$3,589.61
" " B, food "	1,251.19
" " C, sundry expenses	56.96
" " D, wharfage	260.00
" " E, towing	25.00
" " F, heating	68.40
" " G, shifting coal	146.50
573 Total expenses during detention	5,396.66

574 192 SCHEDULE A.—*Amount paid in wages to crew during detention of yacht.*

Voucher.			
A	Total paid for the month of August, 1891, as per pay roll No. 1	$1,092.33	
	Proportion of above for August 27th to 31st		$175.98
B	Total paid for the month of September, as per pay roll No. 2		1,101.17
575 B and C	Total paid for the month of October, as per pay roll No. 3		305.00
D	Total paid for the month of November, as per pay roll No. 4		210.00
E	Total paid for the month of December, as per pay roll No. 5		210.00
F	Total paid for the month of January, 1892, as per pay roll No. 6		210.00
G	Total paid for the month of February, as per pay roll No. 7	210.00	
576	Proportion of above for Feb. 1st to 3rd		21.72
H 1 to H 5	Total paid for night watchman, as per memono No. 8		252.00
H 6	Master's salary, from August 27, 1891, to February 3, 1892, @ $2,500.00 per annum		1,102.74
			3,588.61

577 193 PAY ROLL STEAM YACHT "CONQUEROR," FOR AUGUST, 1891.

DECK DEPARTMENT.

	Voucher.			
1st officer	A 1,	C. N. Unsworth		$75.00
Btswn.	A 2,	J. Anderson		50.00
		(Includes $5 conduct money paid at discharge.)		
Q'rmaster	A 3,	D. E. Hansen,	"	40.00
"	A 4,	H. Rogers,	"	40.00
"	A 5,	F. Bering,	"	40.00
"	A 6,	Henry Bales,	"	40.00
A. B.	A 7,	M. Gunderson,	"	30.00
"	A 8,	John Quinn,	"	30.00
"	A 9,	G. Faglestrom,	"	30.00
578 "	A 10,	Fritz Sellenett,	"	30.00
"	A 11,	Chas. Knox,	"	30.00
				$435.00

ENGINEERS' DEPARTMENT.

Chief engr.	A 12, A. E. Wilson	$125.00	
1st asst. "	A 13, W. Evans	65.00	
Fireman	A 14, T. Lewis	55.00	
	(Includes $5 conduct money paid at discharge.)		
"	A 15, C. Orange. "	50.00	
"	A 16, J. Rieffe. "	50.00	
"	A 17, John Cummings, 1st to 8th inclusive, @ 45	12.90	
"	A 18, Wm. Rigby, from 12th, @ 50	33.33	579
	(Includes $3.33 conduct money paid at discharge.)		
			$390.93

STEWARDS' DEPARTMENT.

Chief steward	A 19, T. Taylor	$60.00	
1st cook	A 20, A. Ridd	60.00	
2nd "	A 21, Geo. Morrell, 1st to 25th, @ 60	42.00	
Saloon waiter	A 22, T. Inglis	40.00	
Officers mess	A 23, Gustaf Herbst	40.00	
Sailors "	A 24, John Baxter	25.00	
			267.00
			$1,092.33

194 PAY ROLL STEAM YACHT "CONQUEROR," FOR SEPTEMBER, 1891. 580

DECK DEPARTMENT.

	Voucher.		
1st officer	B 1, C. N. Unsworth	$75.00	
Btswn.	B 2, J. Anderson	50.00	
Qrmaster	B 3, D. E. Hansen	40.00	
"	B 4, H. Rogers	40.00	
"	B 5, F. Bering	40.00	
"	B 6, Henry Bales	40.00	
A. B.	B 7, M. Gunderson	30.00	
"	B 8, G. Faglestrom	30.00	
"	B 9, John Quinn	30.00	
"	B 10, Fritz Sellenett	30.00	
"	B 11, Charles Knox	30.00	
			$435.00

ENGINEERS' DEPARTMENT. 581

Chief engineer	B 12, A. E. Wilson (the voucher includes 3 days in Oct.)	$125.00	
1st asst. "	B 13, W. Evans	65.00	
Fireman	B 14, T. Lewis (the voucher includes 10 days in Oct.)	55.00	
"	B 15, C. Orange (the voucher includes 5 days in Oct.)	50.00	
"	B 16, James Rieffe (the voucher includes 10 days in Oct.)	50.00	
"	B 17, W. Rigby (the voucher includes 10 days in Oct.)	50.00	
			395.00

STEWARDS' DEPARTMENT.

Chief steward	B 18, T. Taylor (the voucher includes 6 days in Oct.)	$60.00	582
1st cook	B 19, Louis Anderson, 1st to 19th, @ 65	41.17	
2nd "	B 20, Pius Leverino (the voucher includes 6 days in Oct.)	65.00	
Saloon waiter	B 21, T. R. Inglis (the voucher includes 6 days in Oct.)	40.00	
Officers mess	B 22, Gustaf Herbst (the voucher includes 3 days in Oct.)	40.00	
Sailors "	B 23, John Baxter (the voucher includes 3 days in Oct.)	25.00	
			271.17
			$1,101.17

583 195 PAY ROLL STEAM YACHT "CONQUEROR," FOR OCTOBER, 1891.

DECK DEPARTMENT.

	Voucher.		
1st officer	C 1, C. N. Unsworth	$75.00	
Q'rmaster	C 2, Harry Bales	35.00	
			$110.00

ENGINEERS' DEPARTMENT.

Chief engineer	B 12, A. E. Wilson, 3 days	12.50	
584 1st asst. "	C 3, W. Evans	65.00	
Fireman	B 14, T. Lewis (to 10th)	18.33	
"	B 15, C. Orange (to 5th)	8.33	
"	B 17, W. Rigby (to 10th)	16.67	
"	C 4, James Rieffe	35.00	
			155.83

STEWARDS' DEPARTMENT.

Chief steward	B 18, T. Taylar (1 to 6th, @ 60)	12.00	
585 2nd cook	B 20, Pius Leverino (to 7th, @ 65)	15.17	
Saloon waiter	B 21, T. Inglis (to 6th, @ 40)	8.00	
Officers mess	B 22, G. Herbst (to 3rd, @ 40)	4.00	
			39.17
			$305.00

586 196 PAY ROLL STEAM YACHT "CONQUEROR," FOR NOVEMBER, 1891.

	Voucher.		
Chief-officer	D 1, C. N. Unsworth	$75.00	
Engineer	D 2, W. Evans	65.00	
Q'rmaster	D 3, Harry Bales	35.00	
Fireman	D 4, James Rieffe	35.00	
			$210.00

PAY ROLL STEAM YACHT "CONQUEROR," FOR DECEMBER, 1891.

587 1st officer	E 1, C. N. Unsworth	75.00	
Engineer	E 2, W. Evans	65.00	
Q'rmaster	E 3, Harry Bales	35.00	
Fireman	E 4, James Rieffe	35.00	
			$210.00

PAY ROLL STEAM YACHT "CONQUEROR," JANUARY, 1892.

1st officer	F 1, C. N. Unsworth	75.00	
Engineer	F 2, W. Evans	65.00	
Q'rmaster	F 3, Harry Bales	35.00	
Fireman	F 4, James Rieffe	35.00	
588			$210.00

PAY ROLL STEAM YACHT "CONQUEROR," FEBRUARY, 1892.

1st officer	G 1, C. N. Unsworth	75.00	
Engineer	G 2, W. Evans	65.00	
Q'rmaster	G 3, Harry Bales	35.00	
Fireman	G 4, James Rieffe	35.00	
			$210.00

589 197 MEMORANDUM OF AMOUNT PAID VAN HOESEN & BRO. FOR NIGHT WATCHMAN ON YACHT "CONQUEROR" FROM OCTOBER 1, 1891, TO FEBRUARY 3, 1892.

	Voucher.		
H 1,	Bill for October	$62.00	
H 2,	" " November	60.00	
H 3,	" " December	62.00	
H 4,	" " January	62.00	
H 5,	" " February, $58 (3 days of this)	6.00	
			$252.00

SCHEDULE B.—*Cost of feeding crew and board allowance while yacht was detained.* 590

	Voucher.			
	Total cost of feeding crew from August 27th to 31st, as per bill No. 9		$69.00	
	Total cost of feeding crew during the month of September, as per bill No. 10		425.40	
C	Total cost of feeding and board allowance for crew for October, as per bill No. 11		208.00	
D	Total board allowance for crew during November, as per bill 12		175.00	591
E	Total board allowance for crew for December, as per bill No. 13		178.00	
F	Total board allowance for crew for the month of January, 1892, as per bill No. 14		178.00	
G	Total board allowance for crew for February, as per bill No. 15	$172.00		
	Proportion of the above for 3 days of February, 1st to 3rd		17.79	
				$1,251.19

198 COST OF FEEDING CREW FROM AUGUST 27TH TO 31ST. 592

Estimated at 60 cents per man per day.

23 men, 5 days, 115, @ 60 cents $69.00

COST OF FEEDING CREW THE MONTH OF SEPTEMBER.

Estimated at 60 cents per man per day.

23 men, 30 days, 690, @ 60 cents	$414.00		
1 " 19 " 19, @ 60 "	11.40		
		$425.40	

COST OF FEEDING PART OF CREW RETAINED UNTIL OCT., 10TH. 593

Total 50 days' food, @ 60 cents $30.00
(See Schedule A, pay roll No. 3.)

BOARD ALLOWANCE OF CREW RETAINED FOR THE MONTH OF OCTOBER, VIZ:

	Voucher.			
Master	J. E. Wood	$62.00		
1st officer	C 1, C. N. Unsworth	45.00		
Engineer	C 3, W. Evans	31.00		
Qr.-master	C 2, Harry Bales	20.00		
Fireman	C 4, James Rieffe	20.00		594
			$208.00	

BOARD ALLOWANCE FOR THE MONTH OF NOVEMBER.

	Voucher.			
Master	J. E. Wood	$60.00		
1st officer	D 1, C. N. Unsworth	45.00		
Engineer	D 2, W. Evans	30.00		
Qr.-master	D 3, Harry Bales	20.00		
Fireman	D 4, James Rieffe	20.00		
			$175.00	

199 BOARD ALLOWANCE FOR DECEMBER. 595

	Voucher.			
Master	J. E. Wood	$62.00		
1st officer	E 1, C. N. Unsworth	45.00		
Engineer	E 2, W. Evans	31.00		
Qr.-master	E 3, Harry Bales	20.00		
Fireman	E 4, James Rieffe	20.00		
			$178.00	

BOARD ALLOWANCE FOR THE MONTH OF JANUARY, 1892.

			Voucher.		
	Master		J. E. Wood	$62.00	
596	1st officer	F 1,	C. N. Unsworth	45.00	
	Engineer	F 2,	W. Evans	31.00	
	Qr.-master	F 3,	Harry Bales	20.00	
	Fireman	F 4,	James Rieffe	20.00	
					$178.00

BOARD ALLOWANCE FOR THE MONTH OF FEBRUARY.

			Voucher.		
	Master		J. E. Wood	$58.00	
	1st officer	G 1,	C. N. Unsworth	45.00	
	Engineer	G 2,	Wm. Evans	29.00	
	Qr.-master	G 3,	Harry Bales	20.00	
	Fireman	G 4,	James Rieffe	20.00	
					$172.00

597

SCHEDULE C.—*Sundry expenses of crew.*

			Voucher. 1891.		
	I 1,	Sept. 29—	To M. Gunderson's medicine acc't	$6.10	
	I 2,	" 30—	To Dr. Feney, attendance on seaman	24.00	
	I 3,	" 30—	To laundry acc't	26.86	
					$56.96

598 200 SCHEDULE D.—*Amount paid for wharfage during detention of the yacht.*

			Voucher.		
	Feby.	J	To Handren & Robins bill wharfage	$260.00	
					$260.00

SCHEDULE E.

			Voucher.		
	K		Amount paid for towing yacht from Stapleton to Erie Basin, per tug "Indiana"	$25.00	
599					$25.00

SCHEDULE F.—*Expenses of heating yacht while detained.*

			Voucher. 1892.		
	L 1,	Sept. 30,	paid U. S. Fuel Co. for heater	$5.00	
	"	" "	paid U. S. Fuel Co. for fuel	5.00	
	L 2,	Oct. 27,	paid U. S. Fuel Co. for heater	12.50	
600	"	" "	paid U. S. Fuel Co. for fuel	5.00	
	L 3,	" 30,	paid J. Hembury for stove and pipe, &c.	19.60	
	L 4,	Decr. 31,	paid J. A. Simpson, stove and pipe, &c	13.95	
		1892.			
	L 5,	Jan. 7,	paid U. S. Fuel Co. for fuel	5.00	
	L 6,	" 26,	paid U. S. Fuel Co. for fuel, $10. Proportion of above for 8 days, from Jan. 26 to Feb. 3rd	2.35	
					$68.40

601 201 SCHEDULE G.—*Expenses shifting coal.*

			Voucher. 1892.		
	Feb.	19.	Paid Twomey & O'Connell discharging coal from bunkers to deck	$68.50	
	"	27.	Paid laborer trimming coal in bunker	36.00	
	Mar.	23.	Paid laborer trimming coal in bunker	9.00	
	"	30.	Paid laborer trimming coal in bunker	9.00	
	April	6.	Paid laborer for putting coal off decks to bunkers	24.00	
602					$146.50

United States district court, southern district of New York.

FREDERICK W. VANDERBILT
vs.
THE STEAM YACHT "CONQUEROR" AND
J. Sloat Fassett. } 603

Pursuant to the order of reference herein entered on the 29th day of January, 1892, referring it to the undersigned as commissioner, to assess the libelant's damages herein, and report his conclusion with the evidence to the court, I, Samuel H. Lyman, the commissioner therein designated, do hereby respectfully report as follows:

On the 24th day of May, and regularly adjourned days thereafter, I was attended by Mr. Clarke for the libelant, and Mr. Platt,
202 asst. U. S. district attorney, for the respondent, Fassett, and 604
thereupon proceeded to take the evidence which, with the exhibits therein referred to, is annexed to this, my report.

After due consideration of the evidence, and after hearing argument by the proctors for the respective parties, I find the damages suffered by the libelant to be as follows:

Loss of use of boat while detained by the respondent, from August 27, 1891, to Feb. 3, 1892, at $100 per day		$15,000.00
Interest on above from Feb. 3, 1892		337.50
Expenses during detention, paid crew as follows:		605
From August 27th to August 31	$175.98	
For the month of September	1,101.17	
" " " " October	305.00	
" " " " November	210.00	
" " " " December	210.00	
" " " " January, 1892	210.00	
From Feb. 1 to Feb. 3	21.72	
Pay of master of vessel from Aug. 27/91, to Feb. 3/92, at $2,500 per annum	1,102.74	
Total amount paid men		3,336.61
Interest on above from Feb. 3, 1892		75.07 606
Paid for provisions for crew as follows:		
Aug. 27 to Aug. 31/91	$69.00	
For the month of September	425.00	
" " " " October	208.00	
" " " " November	175.00	
" " " " December	178.00	
" " " " January, 1892	178.00	
From Feb. 1 to Feb. 13, 1892	17.79	
		1,251.19
		$20,000.37
203 Amount carried forward		$20,000.37 607
Interest on above from Feb. 3, 1892		28.15
Medical attendance and medicine for men	$30.10	
For washing for men	26.86	
		56.96
Interest on above from Feb. 3, 1892		1.28
For wharfage		260.00
Interest on above from Feb. 3, 1892		5.85
For towing from Stapleton to Erie Basin		25.00
Interest on above from Feb. 3, 1892		56 608
For extra expense in heating vessel		68.40
Interest on above from Feb. 3, 1892		1.54
For shifting coal (an additional expense in making subsequent repairs caused by the detention of the vessel by the respondent)		146.50

	Interest on above from April 6, 1892	$2.19
	To amount paid the night watchman from Oct. 1, 1891, to Feb. 3, 1892	252.00
609	Interest on above from Feb. 3, 1892	5.67
	Total damages	20,854.47

Referring to the above allowance for pay of crew and their expenses after the vessel was seized by the collector, the respondents contend that, inasmuch as it was the duty of the collector to take care of the vessel while in his custody and of the marshal to take care of her from the time he took possession subsequently until her discharge by the court, therefore, the libelant must be held to have voluntarily incurred any such expense. I think that the respondent is in
610 204 error. The collector's possession has been found by the court to have been illegal from the first. The libelant undoubtedly had the right to protect his vessel, in the exercise of his judgment, under the circumstances surrounding her seizure. On this point the testimony of the captain, which is not contradicted, shows that the collector took possession of the yacht on the 27th of August, 1891, by placing only one person on board of her; that from this time till the end of September the collector, through this one representative, remained on board, claiming possession of the yacht; that during all this time she lay in the stream off Stapleton, where it was necessary
611 to have a crew on board to keep her safely, "as no ship could be secure in any stream" under such circumstances without such protection; that he considered that "while the vessel was in that position" that it was necessary to keep the crew to "take care of" her, and that at no time did he employ any more men than was necessary for that purpose.

Indeed, the collector seems to have practically acquiesced to the captain and the crew remaining aboard while he asserted his right to possession, for if he had intended to protect the vessel by the employment of his own force, he would surely not have risked her under the care of one man.

On the 29th of September the collector, at the request of the libel-
612 ant, ordered the vessel placed in the Erie Basin, and the marshal took partial possession, the collector having resisted and his representative still remaining on board. The vessel having been thus removed from the stream where she had been at anchor, the captain testifies that he took steps immediately to get rid of the crew, and that they were discharged as fast as he could do so consistently while preparing the vessel for being laid up. There is nothing to contradict this testimony, and it seems to me that the captain pursued a reasonable, as well as judicious, course, one consistent with his duty to take
613 205 proper care of the vessel. As soon as the marshal, under further process of the court, got exclusive possession of the yacht, on the 8th of October, he put only one man aboard of her to represent him, and employed the captain and four men to take care of the vessel, besides a night watchman. The marshal's possession being a legal possession, he had the right to take this course, and I do not find anything in the testimony, or in the circumstances of the case, to warrant the conclusion that the expenses of keeping such a vessel while in the collector's or the marshal's possession were extravagant. Her

fitting and furniture were very expensive and required great care and attention. Moreover, the season of the year necessitated additional 614
expense in the preservation of the property.

N. Y., June 20, 1892.

Respectfully submitted.

SAMUEL H. LYMAN,
Commissioner.

(Endorsed:) District court of the United States for the southern district of New York. Frederick W. Vanderbilt vs. The steam yacht "Conqueror" and J. Sloat Fassett. Copy commissioner's report. 615

206 United States district court, southern district of New York. 616

FREDERICK W. VANDERBILT
against
YACHT "CONQUEROR" AND J. SLOAT FASSETT.

Exceptions to report of Commissioner Samuel H. Lyman. 617

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The exceptions of J. Sloat Fassett, respondent, to the report of Samuel H. Lyman, U. S. Commissioner, on the assessment of damages, filed herein on the 21st day of June, 1892, allege, as follows:

First exception.—To the allowance of the sum of $15,000, for loss of use of boat while detained by the respondent from August 27, 1891, to February 3, 1892, at $100 per day, and interest on same from February 3, 1892, $337.50. 618

Second exception.—To the allowance of the sum of $3,336.61, for expenses during detention, for payment of crew and master of vessel, and interest on same from February 3, 1892, $75.07.

Third exception.—To the allowance of the sum of $1,251.19, for payment for provisions for crew from Aug. 27 to February 13, 1892, and interest on same from February 3, 1892, $28.15.

Fourth exception.—To the allowance of the sum of $260 for wharfage, and interest on same from Feb'y 3, 1892, $5.85.

207 Fifth exception.—To the allowance of the sum of $25, for towing from Stapleton to Erie Basin, and interest on same from Feb'y 3, 1892, $1.56. 619

Sixth exception.—To the allowance of the sum of $68.40, for extra expense in heating vessel, $68.40, and interest on same from Feb'y 3, 1892, $1.54.

Seventh exception.—To the allowance of the sum of $146.50, for shifting coal, and interest on same from April 6, 1892, $2.19.

Eighth exception.—To the allowance of the sum of $252, paid for night watchman from Oct. 1, 1891, to Feb. 3, 1892, and interest on same from Feb'y 3, 1892, $5.67.

Dated June 23, 1892. 620

EDWD. MITCHELL,
U. S. Attorney, Proctor for Respondent.

(Endorsed:) U. S. district court, southern district of New York. Frederick W. Vanderbilt versus The Yacht "Conqueror" and J. Sloat Fassett. Exceptions to commissioner's report. Edward Mitchell, United States attorney, attorney for respondent. Due service of a copy of the within is hereby admitted. To Root & Clarke, esqs., attorneys for libelant, 32 Nassau street, New York City. Sir: You will please take notice that exceptions, of which the within is a copy, was this day duly filed in the within entitled action, in the office of
621 the clerk of the district court of the U. S. for the southern dist. of N. Y. Dated N. Y., June 23, 1892. Yours, etc., Edwd. Mitchell, U. S. attorney, attorney for respondent. To Root & Clarke, esqs., attorneys for libelant, 32 Nassau st., N. Y. A copy of the within paper received this 23d day of June, 1892. Root & Clarke, proctors for libelant.

Deduct shifting coal and the interest on items, ordinarily paid by the marshal, which do not carry interest; in all, $162.31.

The evidence shows the other items to have been reasonable and necessary.

July 7, '92.

A. B.

622 208 United States district court, southern district of New York.

FREDERICK W. VANDERBILT
vs.
YACHT "CONQUEROR" AND J. SLOAT FASSETT.

623 It appearing to the satisfaction of the court that in this suit or proceeding the acts done by J. Sloat Fassett, set forth in the libel herein, were done by him as collector or officer of the revenue, under direction of the Secretary of the Treasury, it is hereby certified that said J. Sloat Fassett acted therein under the directions of the Secretary of the Treasury, and there was probable cause for said acts done by him.

This certificate is made on application of the respondent, J. Sloat Fassett, and is not opposed by the libelant, who, however, reserves the right to move to vacate the same in case the judgment in his favor is
624 not paid out of the Treasury within a reasonable time.

Dated June 27, 1892.

ADDISON BROWN.

(Endorsed:) U. S. district court, southern district of New York. Frederick W. Vanderbilt versus Yacht "Conqueror" and J. Sloat Fassett. (Cert. copy.) Certificate of probable cause. Edward Mitchell, United States attorney, attorney for respondent. Due service of a copy of the within is hereby admitted. Filed July 19, 1892.

625 209 At a stated term of the United States district court for the southern district of New York, held in the United States district court rooms, in the city of New York, on the 20th day of July, A. D. 1892.

Present, Hon. Addison Brown, district judge.

FREDERICK W. VANDERBILT, LIBELANT,
against
THE STEAM YACHT "CONQUEROR," HER tackle, apparel, and furniture, and J. Sloat Fassett, respondent. 626

This cause having been heard on the pleadings and proofs of the parties, and having been argued by the advocates for the respective parties hereto, and the court being of the opinion that the libelant is entitled to a decree for the possession of the said steam yacht "Conqueror," her tackle, apparel, and furniture; and that the pos- 627
session of the said yacht be restored to the libelant, and that the libelant recover from the respondent, J. Sloat Fassett, the damages which he has suffered by reason of the matters set forth in the libel, together with the costs and expenses of this suit, to be taxed, and an order having been made by the court directing that the libelant's damages be assessed by S. H. Lyman, United States commissioner, who was therein directed to report his conclusions with the evidence to the court, and that the entry of a final decree herein be
210 reserved till the coming in of the report; and the said com- 628
missioner having reported his conclusions with the evidence to the court, whereby it appears that the libelant's damages amounted to the sum of $20,854.47, and exceptions having been filed to the said report by the respondent; and said exceptions having been heard by this court, and the court having overruled said exceptions except certain thereof the items of damages objected to in the exception so sustained, amounting in all to the sum of $162.31, which sum the court directed should be deducted from the amount of damages assessed by the said commissioner.

Now, on motion of Root & Clarke, proctors for the libelant; 629

It is ordered that the sum of $162.31 be deducted from the said sum of $20,854.47, the amount of the libelant's damages so reported by the said commissioner, and that the said report as so modified be, and the same is hereby, in all respects confirmed; and

It is further ordered, adjudged, and decreed that the libelant, Frederick W. Vanderbilt, is entitled to and that he have, and is hereby given, full and complete possession and control of said steam yacht "Conqueror," her tackle, apparel, and furniture, and that the said 630
yacht, her tackle, apparel, and furniture, be delivered to the libelant; and

It is further ordered, adjudged, and decreed that the libelant, Frederick W. Vanderbilt, recover from the respondent, J. Sloat Fassett, the sum of $20,692.16 his damages, together with interest on the sum of $19,646.76 from the 21st day of June, 1892, the date of the filing of the report of the said Commissioner, to July 20th, 1892, the date of the entry of this decree, such interest amounting to the sum of $91.68, together with the sum of $958.50, the amount of the libelant's costs as taxed, together amounting to the sum of $21,742.34; and

211 It is further ordered, adjudged, and decreed, that unless an 631
appeal be taken by the said J. Sloat Fassett from this decree

within the time limited and prescribed therefor, the libelant's stipulation, filed in the clerk's office of this court, on the 4th day of February, 1892, be cancelled.

(Sd.) ADDISON BROWN.

(Endorsed:) U. S. district court. Frederick W. Vanderbilt
632 against The Steam Yacht "Conqueror" and J. Sloat Fassett. Decree. Root & Clarke, proctors for libelant, 32 Nassau street, New York City, New York. Recd. & adm. Given July 20th, 1892. J. O. M. Sir: Please take notice that a decree, of which the within is a copy, was duly entered in the office of the clerk of the United States district court for the southern district of New York, on the 20th day of July, 1892. Yours, &c., Root & Clarke, proctors for libelant, 32 Nassau street, New York City. To Hon. Edward Mitchell, U. S.
633 district attorney.

634 212 United States circuit court of appeals for the second circuit.

FREDERICK W. VANDERBILT, LIBELANT AND APPELLEE,
against
THE YACHT "CONQUEROR" AND J. SLOAT FASSETT,
635 CLAIMANT AND APPELLANT.

To the Honorable the United States Circuit Court of Appeals for the Second Circuit:

The appeal of J. Sloat Fassett, claimant and appellant, respectfully shows to the court:

First. That heretofore and on or about the first day of September, 1891, the above-named libelant, Frederick W. Vanderbilt, filed his libel in the district court of the United States for the southern district of New York, as owner of the yacht "Conqueror," her tackle, apparel, and furniture, against all persons intervening for their interest
636 therein and against J. Sloat Fassett, then in possession thereof, in an alleged cause of possession, civil and maritime, and praying, among other things, for the reasons set forth in said libel, that the said vessel, her tackle, apparel, and furniture may be delivered to said libelant, and the said J. Sloat Fassett be condemned to pay to the libelant his damages and costs in the premises, as by reference to said libel will more fully appear.

Second. That thereafter the said J. Sloat Fassett duly appeared and claimed his right of possession of said yacht, as collector
637 213 of customs at the port of New York, for the enforcement of payment of unpaid duties thereon, under the revenue laws of the United States, which became due upon the arrival of said yacht in the port of New York, on or about the 6th day of July, 1891, and claiming said yacht to be an article imported into the United States within the fair intendment of the customs revenue laws, and as such liable to duty—that Francis Hendricks, as the successor in the said office of collector of the port at New York of said J. Sloat Fassett, also duly appeared, intervening for the interest and possession of the United

States, in said yacht, for the enforcement of payment of unpaid duties thereon, as aforesaid, and duly filed their respective answers to the 638
said libel, praying that the same might be dismissed, as by reference thereto will more fully appear.

Third. That thereafter such proceedings were had that the cause came on to be heard on the pleadings and proofs adduced by the respective parties, before the Honorable Addison Brown, district judge of the United States for the southern district of New York, and the said judge having deliberated thereon, did on or about the 20th day of July, 1892, make and enter a decree, wherein it was decreed that the libelant, Frederick W. Vanderbilt, is entitled to, and that he have and is hereby given, full and complete possession and control of said steam yacht "Conqueror," her tackle, apparel, 639
and furniture, and that the said yacht, her tackle, apparel, and furniture, be delivered to the libelant, and also that the libelant, Frederick W. Vanderbilt, recover from the respondent, J. Sloat Fassett, the sum of $20,692.16, his damages, together with interest on the sum of $19,646.76, from the 21st day of June, 1892, the date of the filing of the report of the commissioner to July 20th, 1892, the date of the entry of the decree, such interest amounting to the sum
214 of $91.68, together with the sum of $958.50, the amount of the 640
libelant's costs, as taxed, together amounting to the sum of $21,742.34.

Fourth. That the said claimant and appellant is advised and insists that the said decree was erroneous, inasmuch as he is entitled to have the said libel dismissed, and a restitution of the possession of the said yacht decreed to him, on behalf of the United States, for the enforcement of the payment of duties, due and unpaid thereon, under the customs revenue laws of the United States.

Wherefore, the claimant and appellant, for these and other reasons, appeals from the said decree to the United States circuit court of appeals for the second circuit, and respectfully prays that all the pleadings, testimony, and proceedings in the cause may be removed 641
to the said United States circuit court of appeals, and that said court will proceed to hear the said cause anew on said pleadings, proof, and proceedings, and that the said decree may be reversed with costs, and a decree made, dismissing said libel, and restoring the possession of said yacht to the claimant and appellant, or to Francis Hendricks, his successor in office, as collector of customs at the port of New York, and that such other order or decree may be made as to said court shall seem just.

Dated New York, July 21, 1892.

EDWARD MITCHELL,
United States Attorney, Proctor for Claimant and Appellant,
Room 50, P. O. Building, New York City, N. Y. 642

The foregoing appeal is allowed.
Dated July 21st, 1892.
(Signed) E. H. LACOMBE.

(Endorsed:) U. S. circuit court of appeals for the second circuit. Frederick W. Vanderbilt, libelant and appellee, vs. The Yacht "Con-

queror," and J. Sloat Fassett, claimant and appellant. (Copy.) Allowance of appeal. Edward Mitchell, United States attorney, attorney for appellant. Due service of a copy of the within is hereby admitted.

643 215 United States district court, southern district of New York.

FREDERICK W. VANDERBILT, LIBELANT,
against
THE YACHT "CONQUEROR" AND J. SLOAT FASSETT, claimant.

644 SIRS: Please take notice that the claimant, J. Sloat Fassett, appeals to the United States circuit court of appeals for the second circuit, from the final decree entered herein, on the 20th day of July, 1892, and from each and every part thereof.

Dated New York, July 21st, 1892.

Yours, &c.,

EDWARD MITCHELL,
U. S. Attorney, Proctor for Claimant,
Room 50, P. O. Bulding, New York City.

645 To ROOT & CLARKE, Esqs.,
Proctors for Libelant, 32 Nassau Street, New York City, and to
SAMUEL H. LYMAN, Esq.,
Clerk of U. S. District Court:

(Endorsed:) U. S. district court, southern district of New York. Frederick W. Vanderbilt vs. The Yacht "Conqueror" and J. Sloat Fassett. Notice of appeal. Edward Mitchell, United States attorney, attorney for claimant and appellant. Due service of a copy of the within is hereby admitted. New York, July 21st, 1892. Root & Clarke, attorneys for libelant.

646 216 United States district court for the southern district of New York.

FREDERICK W. VANDERBILT, LIBELANT AND appellee,
against
THE STEAM YACHT "CONQUEROR" AND J. Sloat Fassett, claimant and appellant.

647 *Assignment of errors.*

The above-named claimant and appellant hereby assigns error to the decree of the district court of the United States for the southern district of New York, in the above-entitled cause, in the following particulars:

First. In that it ordered, adjudged, and decreed that the libelant is entitled to, and that he have and is given full and complete possession and control of said steam yacht "Conqueror," her tackle,

apparel, and furniture, and that the said yacht, her tackle, apparel, 648
and furniture be delivered to the libelant.

Second. In that it ordered, adjudged, and decreed that the libelant, Frederick W. Vanderbilt, recover from the respondent, J. Sloat Fassett, the amount of $21,742.34 for his damages, interest, and costs.

Third. In that it did not make a decree dismissing said libel, and restoring the possession of said yacht to the claimant, or to Francis Hendricks, his successor in office as collector of customs at
217 the port of New York, for the enforcement of the payment 649
of duties, due and unpaid thereon, under the customs revenue laws of the United States.

Dated July 21, 1892.

EDWARD MITCHELL,
U. S. Attorney, Proctor for Claimant and Appellant,
Room 50, P. O. Building, New York City, N. Y.

(Endorsed:) U. S. district court, southern district of New York. Frederick W. Vanderbilt, libelant and appellant, vs. The Yacht "Conqueror" and J. Sloat Fassett, claimant and appellant. Assignment of errors. Edward Mitchell, United States attorney, attorney for 650
appellant. Due service of a copy of the within is hereby admitted. New York, July 21st, 1892. Root & Clarke, attorneys for libelant. 651

218 UNITED STATES OF AMERICA, *ss:* 652

To Frederick W. Vanderbilt, libelant and appellee:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the second circuit, at the city of New York, on the 20th day of August, 1892, pursuant to an appeal on the part of J. Sloat Fassett, claimant and appellant, filed in the clerk's office of the district court of the United States for the southern district of New York, in a certain suit of Frederick W. Vanderbilt, libelant, against The Yacht "Conqueror" and J. Sloat 653
Fassett, claimant, to show cause, if any there be, why the decree of the U. S. district court, in the said appeal mentioned, should not be reversed, modified, or corrected, and speedy justice should not be done in that behalf.

Given under my hand at the city of New York, in the southern district of New York, on the 21st day of July, 1892.

(Signed) E. H. LACOMBE,
Judge of the U. S. Circuit Court of Appeals
for the Second Circuit.

EDWARD MITCHELL,
U. S. District Attorney, 654
on behalf of J. Sloat Fassett, Appellant.

(Endorsed:) U. S. circuit court of appeals for the second circuit. Frederick W. Vanderbilt, libelant and appellee, agst. The Yacht "Conqueror" and J. Sloat Fassett, claimant and appellant. Citation. Edward Mitchell, U. S. attorney, atty. for claimant and appellant. Due service of a copy of the within citation is hereby admitted. Served, July 21, 1892.

655 219 It is stipulated that the foregoing constitutes the record on appeal in this case.

ROOT & CLARKE,
Proctors for Libelant.
EDWD. MITCHELL,
U. S. Attorney,
Proctor for Claimant and United States.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

656 FREDERICK W. VANDERBILT, LIBELANT AND appellee,
vs.
THE ST. YACHT "CONQUEROR," HER ENGINES, &c., J. Sloat Fassett, claimant and appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the
657 district court in the above-entitled cause, made up pursuant to Rule No. 52 in Admiralty of the United States Supreme Court.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 28th day of December, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the said United States the one hundred and seventeenth.

[SEAL.] SAML. H. LYMAN, *Clerk.*

220 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court rooms in the city of New York, on Friday, the second day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the Honorable William J. Wallace, the Honorable E. Henry Lacombe, and the Honorable Nathaniel Shipman, circuit judges.

FREDERICK W. VANDERBILT, LIBELLANT AND appellee,
vs.
THE STEAM YACHT "CONQUEROR," HER ENGINES, &c., J. Sloat Fassett, claimant and appellant.

This cause coming on to be heard, Mr. Henry C. Platt, assistant United States attorney, is heard on behalf of the claimant and appellant.

Mr. Elihu Root is heard on behalf of the libellant and appellee.

221 At a stated term of the United States circuit court of appeals for the second circuit, held at the United States court rooms in the city of New York, on Monday, the fifth day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the Honorable William J. Wallace, the Honorable E. Henry Lacombe, and the Honorable Nathaniel Shipman, circuit judges.

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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

THE STEAM YACHT CONQUEROR, HER tackle, apparel, and furniture, J. Sloat Fassett, claimant and appellant,
v.
FREDERICK W. VANDERBILT, LIBELant and appellee.

98.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

In the Supreme Court of the United States.

THE STEAM YACHT CONQUEROR, HER tackle, apparel, and furniture, J. Sloat Fassett, claimant and appellant,

v.

FREDERICK W. VANDERBILT, LIBELANT and appellee.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF THE CASE AND PETITION.

WHERE A COLLECTOR, ACTING IN GOOD FAITH, UNDER THE DIRECTION OF THE SECRETARY OF THE TREASURY, SEIZES FOR NONPAYMENT OF DUTIES AN ARTICLE WHICH IS ENTITLED TO FREE ENTRY, ARE THE UNITED STATES LIABLE TO THE OWNER, NOT ONLY FOR THE RETURN OF THE ARTICLE, BUT FOR CONSEQUENTIAL DAMAGES ON ACCOUNT OF ITS DETENTION?

This is the principal question which I desire to bring before the court for decision by this application.

On July 6, 1891, the libelant, Frederick W. Vanderbilt, having bought in England for £15,500 the yacht *Conqueror*, which had been built at Glasgow, Scotland, brought her into the United States on August 27, 1891.

J. Sloat Fassett, collector at the port of New York, acting under the direction of the Secretary of the Treasury, seized the yacht to enforce the payment of an import duty claimed to be due under the tariff act of October 1, 1890 (c. 1244, 26 Stats., 567). Thereupon Mr. Vanderbilt filed his libel in the district court of the United States for the southern district of New York against the collector, insisting that the yacht was not an imported article subject to the payment of duty, and praying to be restored to her possession, and for damages. The United States applied to this court for a writ of prohibition, which the court, without passing upon the question whether the yacht was subject to duty, refused upon the ground that the district court had jurisdiction to determine that question. (*In re Fassett, petitioner*, 142 U. S., 479.) The libel then proceeded to hearing in the district court. The court (Brown, J.) held that the yacht was not an imported article liable to duty (opinion, Rec. C. C. A., 152), and entered a decree awarding restitution of her to Mr. Vanderbilt, and also a judgment in his favor for the sum of $20,783.84 damages and $958.58 costs—in all, $21,742.42. (Rec. C. C. A., 209,211.) The damages allowed were (Record C. C. A., 201–207)—

For loss of the use of the boat from August 27, 1891, the day when she was seized by the collector, to February 3, 1892, the day when she was redelivered to Mr. Vanderbilt under the decree of the district court, at $100 per day $15,000.00

(The vessel was taken into the custody of the marshal, under the owner's libel, October 8, 1892, and from that time on was in the custody of the marshal and not of the collector.)

For expenses of detention, including the pay of the crew and master, provisions for the crew, medical attendance, etc	$5 250.16
For interest	533.68
Total	20,783.84

The judge granted a certificate of probable cause, which is indorsed, "Filed July 19, 1892" (Rec. C. C. A., 208), and is supposed under Revised Statutes, section 989, to have the effect of relieving the collector from personal liability for the judgment and to make the United States liable for its payment.

The second assignment of error filed in the circuit court of appeals was to the adjudging of damages, costs, and interest to the libelant (Rec. C. C. A., 216). On June 5, 1893, the circuit court of appeals affirmed the judgment of the district court without opinion.

I submit that the action of the district court and of the circuit court of appeals in awarding judgment against the United States for consequential damages on account of the detention of the yacht is in disregard of fundamental principles of law and in violation of section 970 of the Revised Statutes. The decision, which is without a judicial precedent, and which seems to have been reached without any consideration of the point involved in either the district court or the circuit court of appeals, is of such grave importance to the Government, not only in this case but as a precedent, that I feel justified in asking a writ of certiorari to bring the judgment of the circuit court of appeals up for review. The case also presents the question whether a foreign-built yacht is an imported article within the meaning of the tariff act of October 1, 1890.

Printed briefs supporting the contention of the Government that the vessel was an "imported article" are now on the files of the court in the prohibition proceeding, and as the position taken by the Government and the authorities in support thereof are considered in the opinion of Judge Brown, I will not, on this application, discuss that branch of the case, but confine myself to the question of the right of the libelant to recover consequential damages and costs.

BRIEF OF ARGUMENT.

I.

SECTION 970 OF THE REVISED STATUTES PREVENTS A RECOVERY EITHER AGAINST THE UNITED STATES OR THE COLLECTOR PERSONALLY OF CONSEQUENTIAL DAMAGES OR COSTS ON ACCOUNT OF A SEIZURE MADE, BONA FIDE AND WITH PROBABLE CAUSE, UNDER THE SUPPOSED AUTHORITY OF THE ACTS OF CONGRESS RELATIVE TO THE COLLECTION OF CUSTOMS. THE RECOVERY SHOULD BE LIMITED TO THE RETURN OF THE PROPERTY OR ITS VALUE.

It conclusively appears in the record, not only from the averments of the libel and the answers and the opinion of the district judge, but from the certificate of probable cause, that the acts of Collector Fassett were done, *bona fide*, by virtue of his office, under the express directions of the Secretary of the Treasury, on the supposition that the yacht was subject to entry and liable to the payment of duties, as an imported article, and was consequently subject to seizure and detention under the customs revenue laws. Section 970 of the Revised Statutes was enacted with the view of affording protection to the officer against any claim in such a case, except for the return of the property or its value.

The section reads as follows:

> When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution: *Provided*, That the vessels, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent.

The section is taken from section 89 of the customs act of March 2, 1799 (c. 22, 1 Stat., 627, 696), which however did not undertake to grant immunity except with respect to seizures made for penalties accruing by any breach of *that* act.

The added words "under any act of Congress authorizing such seizure," which are now found in section 970 of the Revised Statutes, were first used in the *special* act of February 24, 1807 (c. 19, 2 Stat., 422), and were manifestly introduced for the purpose of extending to *all* seizures by *any* officer under *any* act of Congress, the immunity which by section 89 of the customs act of March 2, 1799, was granted only to seizures by collectors under that act.

The act of February 24, 1807, is as follows:

> AN ACT respecting seizures made under the authority of the United States and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives in Congress assembled*, That when any pros-

ecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, made by any collector or other officer, *under any act of Congress authorizing such seizure*, and judgment shall be given for the claimant or claimants, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit or judgment on account of such seizure and prosecution: *Provided*, That the ship or vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents.

SEC. 2. And be it further enacted, That the accounting officers of the Treasury be, and they are hereby, authorized and directed to allow to the collector of New York, in the settlement of his accounts, the amount of damages and costs recovered from and paid by him by virtue of judgments rendered in the supreme court of the State of New York on account of the seizure of the ship Liberty and of the ship Two Marys, which vessels had been seized and libelled for a presumed infraction of the provisions of the act, intituled "An act concerning the registering and recording of ships and vessels."

The act referred to in the second section was passed December 31, 1792 (c. 1, 1 Stat., 287). Light is thrown on the history of the act of 1807 by the case of *Imlay* v. *Sands* (1 Caines, 566), where the supreme court of New York, in February, 1804, held that probable cause of seizure was no justification for a collector of the customs

or other officer making seizures under the act of June 13, 1798, suspending the commercial intercourse between the United States and France and the dependencies thereof. On page 573 the court said:

> The act of Congress under which the seizure was made makes no provision for the exoneration of the custom-house officer.

And the court added:

> Nothing appears but that the defendant acted in good faith, and although it would seem reasonable that where the officer acted *bona fide*, and according to his best judgment, he ought to be protected, yet we are bound to pronounce the law as we find it, and leave cases of hardship, where any exist, to legislative provision. Lord Kenyon, in the case of *Warne* v. *Varley* (6 D. and E., 448), treats this question as long since at rest in England. He says that custom-house officers were, until a late act of Parliament (19 G. II, c. 34, s. 16) was passed to protect them, liable to an action for seizing goods if it ultimately turned out that the goods were not the subject-matter of seizure, even though there was a probable cause for seizing them.

The English act referred to is evidently the basis on which was constructed the American act of 1799, and will be found in 18 (Eng.) Stat. at Large, pp. 499, 500.

In the case of *Warne* v. *Varley*, *supra* (decided in 1795), the court held that—

> Searchers of leather appointed under stat. 2, Jac. 1, c. 22, are authorized to seize leather *insufficiently dried*, in order to carry it before officers called triers, but they can not seize any leather which is sufficiently dried, though *in their judgment it be not so*; and if they do they are liable to an action of trespass.

The opinion of Lord Chief Justice Kenyon begins with expressions of regret that he could not find some ground on which the defendant's justification could be supported, because they appeared to have acted fairly and bona fide, but that as Parliament had not provided for the particular case before the court the defense of probable cause could not be sustained. He said further (p. 448):

> This case does not differ in principle from those alluded to of custom-house and excise officers. In those cases, which more frequently occur, the legislature have gradually introduced new laws as the occasion called for them. Custom-house officers were, until a late act of Parliament was passed to protect them, liable to an action for seizing goods if it ultimately turned out that the goods were not the subject-matter of seizure, even though there was a probable cause for seizing them. Excise officers continued in this situation to a later time upon a supposition, I believe, that the statute respecting custom-house officers extended to them, and when it was discovered that they were not protected by the former act the legislature made a similar law for their protection.

Averill v. *Smith*, 17 Wall., 82 (1872), is an instructive case construing the act of 1807, and reviewing the cases on the subject of probable cause. This court held that—

> Trespass will not lie against a collector of internal revenue for improperly seizing and carrying away goods as forfeited, where, on information afterwards filed, the marshal has returned that *he* has seized and attached them, and where after a trial absolving them a certificate of probable cause has been granted under the eighty-ninth section of the act of February

24, 1807, and where the owner of the goods has never made any claim of the collector for them except by bringing the action of trespass.

The claimant of the goods after the trial, where probable cause has been certified, ought to move the court for the necessary orders to cause the property to be returned to the rightful owner, if the court had itself omitted to make such an order. It is not the duty of either the marshal or collector to do so.

On the effect of probable cause, Mr. Justice Clifford, delivering the opinion of the court, said (p. 91):

2. Proof of probable cause, if shown by the certificate of the district court which rendered the decree discharging the property, is a good defense to an action of trespass brought by the claimant against the collector who made the executive seizure, provided it appears that judicial proceedings were instituted and that the charge against the property was prosecuted to a final judicial determination. Where the respondent prevails in such an information, the court, says Mr. Parsons (On Shipping, 491), give to the prosecuting or seizing officers a certificate of probable cause, if in their judgment he had such cause for the seizure, and that, he says, protects the officer who made the seizure from prosecution for making the same.

And, on page 92, the court further said:

Differences of opinion existed for a time as to the meaning of the term "probable cause," but it is settled that it imports circumstances which warrant suspicion, and that *a doubt respecting the true construction of the law is as reasonable a cause of seizure as a doubt respecting the fact.* (*Locke* v. *United States*, 7 Cranch, 348; *United States* v. *Riddle*, 5 *ib.*, 313; *The George*, 1 Mas., 27.)

So that the case at bar was a proper one in which to allow the defense.

Where probable cause will excuse, the officer making the seizure is not liable for *consequential* damages, but otherwise he is liable for all damages which have followed the seizure. *Shattuck* v. *Maley*, 1 Wash., C. C. 245 (1805), affirmed in 3 Cranch, 458.

The protection of section 970 does not extend to prevent a recovery of judgment for the property or its value, but effectually establishes as the rule of damages in cases of seizure with probable cause that *consequential* damages can not be recovered. The distinction is pointed out in *Jecker* v. *Montgomery* (13 How., 498, 517–518), where the court said:

> And if, on the contrary, it should be found that they were not liable to capture, as prize of war, the libellant would be entitled to restitution, or the value in damages, although the strongest probabilities appeared against them at the time of the seizure. *Probable cause or not becomes material only where restitution is awarded and the libellants claim additional damages for the injuries and expenses sustained from the seizure and detention.* It applies only to these additional damages; and, however strong the grounds of suspicion may have been, it is no bar to *restitution*, etc.

It was for the court to determine whether or not there was probable cause for the seizure. *Buck'ey* v. *United States*, 4 How., 251, 260 (1845).

The certificate of probable cause was filed on July 19, 1892, while the final decree was not entered until July 20, 1892. It would seem, from the fact that the suit was not

only for restitution but for damages as well, that a mere holding of probable cause and denial of damages would have been sufficient, without the making and filing of a formal certificate. But where a certificate is necessary, it has been held that one will be granted even after the expiration of two and a half years from the rendition of the judgment determining the right to possession. *United States* v. *The Ship Recorder*, 2 Blatch., 119, 120.

In the case just cited a vessel was seized upon a construction of a statute adopted by the Secretary of the Treasury in conformity with the opinion of the Attorney-General, and the collector acted under the instructions of the former officer (as in the case at bar) in making the seizure, and it was said, page 120:

> It makes no difference whether the collector acted under a mistake as to facts on which he had reason to rely, or as to the law.

Section 970 does not of course refer to cases in which the seizure is *justified* by an act of Congress, because in such a case the judgment would be against the claimant and there would be no occasion for a certificate of probable cause.

II.

SECTION 989 OF THE REVISED STATUTES HAS NO APPLICATION TO THE CASE AT BAR.

The section reads as follows:

> When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid

into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

This section is taken from section 12 of the act of March 3, 1863 (c. 76, 12 Stat., 737, 741), entitled "An act to punish frauds upon the revenue," etc., viz:

SEC. 12. *And be it further enacted*, That in all suits or proceedings against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officer and by him paid into the Treasury of the United States, in the performance of his official duty, in which any district or other attorney shall be directed to appear on behalf of such officer by the Secretary or Solicitor of the Treasury, or by any other proper officer of the Government, such attorney shall be allowed such compensation for his services therein as shall be certified by the court in which such suit or proceedings shall be had, to be reasonable and proper, and approved by the Secretary of the Treasury; and where a recovery shall be had in any such suit or proceedings, and the court shall certify that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

This act of March 3, 1863, does not purport to repeal or affect the act of 1807, then in force, or the rule of law there laid down as to the measure of damages in cases of *seizures* with probable cause; and as both sections were incorporated into the Revision, they evidently were intended to be, and should be, construed as covering distinct and separate matters. Section 970 relates to cases of *seizures*, and section 989 to acts *other than seizures* for which a remedy by action is given, as in section 3011 of the Revised Statutes. In cases covered by section 970, the property or its proceeds remains in the custody of the officer, or of the court if a libel is filed, pending adjudication, and the liability of the Government is limited to a return of the property, whereas in cases under section 989 where, in compliance with the provisions of section 3010 of the Revised Statutes, duties have been collected and gone out of the possession of the officer into the possession of the Government, the Government on similar grounds submits to liability for that of which it has received the benefit. But beyond this no liability is assumed by the Government in either case. The claim that the Government intended by the act of 1863 (Rev. Stat., sec. 989) to submit itself to liability for *consequential* damages can not be maintained in the face of the strong expression to the contrary in section 970 and of the uniform policy of the Government based upon the established principle of law that the Government is not responsible for the torts of its agents, referred to by Mr. Justice Nelson in his opinion in *The Siren*, 7 Wall., 165.

CONCLUSION.

For the error, patent on the record, in awarding judgment for damages and costs, I submit that the writ of certiorari should be granted.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

Office Supreme Court U. S.
FILED.
APR 16 1894
JAMES H. McKENNEY,
CLERK.

C. G. Burgoyne's Printing Business, 146 [illegible] St., N. Y.

Supreme Court of the United States.

THE STEAM YACHT "CONQUEROR," her TACKLE, APPAREL and FURNITURE, J. SLOAT FASSETT, Claimant and Appellant,

AGAINST

FREDERICK W. VANDERBILT, Libellant and Appellee.

98.

Brief for F. W. Vanderbilt in Opposition to the Solicitor-General's Petition for Certiorari.

(NOTE.—We file herewith a certified copy of the decree of the District Court, the mandate of the Circuit Court of Appeals and of the decree of the District Court thereon. These papers are printed in the appendix hereto.)

STATEMENT.

A. On September 1st, 1891, Vanderbilt filed a libel in the District Court of the United States for the Southern District of New York, in a cause of possession civil and maritime against the yacht "Conqueror," and against Collector Fassett, alleging that theretofore Fas-

sett had wrongfully taken possession of the yacht on navigable waters in New York Harbor, and detained her in his possession and custody.

B. The libel further alleged that Collector Fassett took and maintained possession of the yacht "solely upon the claim that she was an article imported into the United States within the fair intendment of the customs revenue laws, and as such liable to duty; that the duties which accrued upon her importation were unpaid, and that he was entitled to take and keep her in safe custody until such duties should be paid or secured in the manner provided by law for article imported into the United States; that the said vessel was not seized under any claim of authority therefor given by any provision of the laws of the United States relating to commerce and navigation, or of any law of the United States providing a penalty or forfeiture" (Record, p. 5).

This allegation was admitted by Collector Fassett's answer (Record, p. 45).

C. On October 19th, 1891, Collector Fassett applied to this Court for a writ of prohibition. His petition was denied, this Court holding that the question whether the yacht was an imported article or not, within the meaning of the customs revenue laws, was a question of which the District Court in Admiralty had jurisdiction in the cause of possession instituted by Vanderbilt.

In re Fassett, 142 U. S., 479.

D. Thereafter the District Court proceeded to try the case, and, being of opinion that the libellant was entitled to be restored to the possession of the yacht, and to recover from Fassett the damages suffered by reason of the matters set out in the libel, together with costs and expenses, ordered a reference to a Commissioner for the assessment of the damages (Record, p.

116). On the coming in of the Commissioner's report, a final decree was entered adjudging possession of the yacht to Vanderbilt, and a recovery in his favor against Fassett for the sum of $20,692.16, as damages, and interest from the date of the Commissioner's report, and also for the sum of $958.50, the amount of libellant's costs as taxed. This decree was entered on July 20th, 1892 (Record, pp. 209, 210).

E. The day before this decree was entered, but after the Court had passed on the exceptions to the Commissioner's report, it made a certificate that the acts done by Fassett, set forth in the libel, were done by him as Collector or officer of the Revenue, under direction of the Secretary of the Treasury, and that there was probable cause for such acts done by him. This certificate was made on application of Fassett, and was not opposed by libellant, who, however, reserved the right to move to vacate the same in case the judgment in his favor should not be paid out of the Treasury within a reasonable time. This certificate is in the usual form of certificates under Revised Statutes, Section 989, and the purpose of it was to relieve Fassett from personal liability, and to fasten a corresponding liability upon the United States (Record, p. 208).

F. From the decree of the District Court Fasset took an appeal to the Circuit Court of Appeals for the Second Circuit, on July 21st 1892 (Record, p. 212). The Court of Appeals affirmed the decree, and on June 7th, 1893, issued its mandate to the District Court and commanded it to take further proceedings according to law. The mandate was filed in the District Court on June 19th, 1893 and on the same day the District Court entered a decree adopting the judgment of the Court of Appeals and providing for a recovery by Vanderbilt of the costs of the appeal, and that the libellant's stipulation for costs and for value should be canceled and the stipulators exonerated.

Although the effect of the certificate under Section 989 was to transfer Fassett's personal liability to the Government, the United States did not appeal from the decree of the District Court.

G. The Solicitor-General now applies for *certiorari*. To what Court he wishes the writ to be addressed is not clear.

FIRST POINT.

The United States is not entitled to the writ.

The United States did not appeal from the decree of the District Court or from the allowance by that Court of a certificate under R. S., Section 989.

The time for appeal has expired.

SECOND POINT.

Fassett is not entitled to the writ.

The writ cannot run to the Circuit Court of Appeals because that Court has lost all jurisdiction of the cause. It has entered its decree, issued its mandate and the term of Court at which these things were done has expired.

Section 6 of the Act of 1891 gives this Court power to review by *certiorari* only by way of exception to the general grant of power to the Court of Appeals to render final decisions in the enumerated classes of cases.

It is a possible construction of this Court's commission that in any of the enumerated cases a writ might be issued to the District Court without any appeal or writ of error to the Court of Appeals; but surely, if the writ is to run to the District Court, it ought to be applied for before the time to appeal from the decree of that Court has expired.

This Court's commission also no doubt extends to sending the writ to the Court of Appeals; but surely the writ ought not to issue to that Court in any case except while that Court has jurisdiction of the case; *i. e.*, after an appeal thereto has been taken and before the end of the term in which that Court issues its mandate.

We do not find in the statute any express limitation of time within which application to this Court for *certiorari* must be made; but surely the law does not mean that litigations are never to be absolutely at rest and the decrees of the Court of Appeals never absolutely final. If the limit is not as above suggested, what is it?

THIRD POINT.

The Solicitor-General is manifestly mistaken in supposing that the judgment for costs and damages against Fassett was an error.

A. His own authorities show that, unless there is some controlling statute, damages and costs follow as a natural sequence from such wrongful acts as were charged in this libel.

See, also, McLean vs. Hagar, 31 Fed. Rep., 602.
Tracy vs. Swartwout, 10 Peters, 80.

Slocum vs. Mayberry, 2 Wheaton, 1.
The Apollon, 9 Wheaton, 362.

B. Section 970, U. S. R. S., manifestly does not apply to this case.

That section relates only to such seizures as are the basis of a prosecution by the United States or by some officer or representative of the United States; *e. g.*, seizures for penalties, forfeiture, confiscation, &c.

See R. S., Secs. 3087, 923, 938, 940.
Also Secs. 564, 570, 734, 909, 920, 3066, 3074, &c., &c.

See, also,
Gelston vs. Hoyt, 3 Wheat., 246.
The Betsey, 4 Cranch., 443.

The words in § 970, "prosecution commenced on account of the seizure of any vessel, &c.," do not refer to a suit brought like this against a Government officer, but to a suit brought by a Government officer on account of and to give effect to a seizure made by him or by some other officer of the Government. This is clear from the fact that it is the prosecutor who by the terms of the section is exempted from suit or judgment; that is to say, the prosecution described is a Government prosecution for adjudication upon a seizure; and in such a proceeding the prosecutor—that is, the Government officer who proceeds for the adjudication—and the person who made the seizure upon which that prosecution proceeds, are exempted from liability. This cause in admiralty was not the prosecution contemplated by Section 970. Vanderbilt was not the prosecutor. If he were, nevertheless, judgment has not been rendered for the claimant in this cause. Fassett is the claimant here, and judgment has been rendered against him. The vessel is not to be returned to him in accordance with the proviso of the section.

The section applies only "when * * * judg-

ment is rendered for the *claimant*." By "claimant" clearly is here meant some one whose interest is adverse to the seizure. It certainly does not mean the seizor. Nor does the word "claimant" describe one who, as plaintiff in an action against a government officer, puts him in the position of defendant.

The same idea is indicated by the phrase "the claimant shall not in such case be entitled to costs." It is also indicated by the proviso "that the vessels, &c. * * * be after judgment forthwith returned to such claimant."

The exemption from liability "nor shall the person who made the seizure, nor the prosecutor be liable to suit or judgment *on account of such suit or prosecution*" taken literally, does not exempt from suit or judgment *on account of the seizure*. To make this section effective (beyond exemption of liability for costs of the prosecution) it is necessary to limit it to such seizures as are themselves a part of the prosecution, so that the seizure will be included in the meaning of the words "on account of such suit or prosecution."

C. The taking and holding of this yacht by the Collector was not such a seizure.

It is alleged in the libel and admitted by Fassett's answer that Fassett acted *solely* upon the claim that the yacht was an article imported into the United States within the fair intendment of the Customs Revenue Laws, and as such liable to duty; that the duties which accrued upon her importation were unpaid, and that he was entitled to take and keep her in safe custody till such debts should be paid or secured in the manner provided by law for articles imported into the United States, and that the yacht was not seized under any claim of authority therefor given by the Navigation Laws or of any law of the United States providing a penalty or forfeiture.

The laws under which the Collector acted do not con-

template any judicial proceeding whatever. Those laws were summarized by this Court in its opinion on the application for prohibition as follows (Re Fassett, 142 U. S. at p. 485):

> "It is provided by Sec. 2785 of the Revised Statutes, that the owner of imported merchandise shall make entry of it with the Collector within a specified time. Section 2963 provides that when merchandise imported into the United States has not been duly entered, it shall be deposited in the public warehouse and there remain. Section 2964 provides that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, the merchandise shall be taken possession of by the Collector and deposited in the public stores, there to be kept, subject at all times to the order of the importer, on payment of the proper duties and expenses. Section 2973 provides that if the merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, it is then to be appraised and sold by the Collector at public auction, and the proceeds, after deducting for storage and other charges and expenses, including duties, are to be paid over to the importer."

D. This Court has already considered the nature of the Collector's act in taking possession of this vessel, and has declared it not to be a seizure involving a prosecution.

In disposing of the application for prohibition the Court found it necessary to determine whether Vanderbilt had any other remedy than by this libel, and it said (at p. 488):

> "The vessel in this case was not seized for forfeiture. If she had been, that seizure would be one to be followed by a suit for forfeiture instituted by the United States, and thus she would be brought within the jurisdiction of a court of the United States. But she is not to be prosecuted in court by an affirmative proceeding instituted by the United States to recover the duties upon her as an imported article, which

are claimed by the United States; and thus the only way in which she can be brought under the jurisdiction of a court of the United States is by the institution of the libel in question."

FOURTH POINT.

The petition should be denied.

ELIHU ROOT,
SAMUEL B. CLARKE,
Of Counsel.

APPENDIX.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss. :

I, SAMUEL H. LYMAN, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file, and remaining of record in my office, that they are correct transcripts therefrom, and of the whole of the said originals.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 29th day of March in the year of our Lord one thousand eight hundred and ninety-four, and of the independence of the said United States the one hundred and eighteenth.

[SEAL.]

SAML. H. LYMAN,
Clerk.

At a Stated Term of the United States District Court for the Southern District of New York, held in the United States District Court Rooms in the City of New York, on the 20th day of July, A. D. 1892.

Present—Hon. Addison Brown, District Judge.

Frederick W. Vanderbilt,
Libellant,

against

The Steam Yacht "Conqueror," her tackle, apparel and furniture and J. Sloat Fassett,
Respondent.

This cause having been heard on the pleadings and proofs of the parties, and having been argued by the advocates for the respective parties hereto, and the Court being of the opinion that the libellant is entitled to a decree for the possession of the said steam yacht "Conqueror," her tackle, apparel and furniture, and that the possession of the said yacht be restored to the libellant and that the libellant recover from the respondent J. Sloat Fassett the damages which he has suffered by reason of the matters set forth in the libel, together with the costs and expenses of this suit, to be taxed, and an order having been made by the Court directing that the libellant's damages be assessed by S. H. Lyman, United States Commissioner, who was therein directed to report his conclusions with the evidence to the Court and that the entry of a final decree herein be reserved till the coming in of the report, and the said Commissioner having reported his conclusions with the evidence to the Court, whereby it appears that the

libellant's damages amounted to the sum of $20,854.47, and exceptions having been filed to the said report by the respondent, and said exceptions having been heard by this Court, and the Court having overruled said exceptions except certain thereof, the items of damages objected to in the exceptions so sustained, amounting in all to the sum of $162.31, which sum the Court directed should be deducted from the amount of damages assessed by the said Commissioner;

Now, on motion of Root & Clarke, proctors for the libellant;

IT IS ORDERED that the sum of $162.31 be deducted from the said sum of $20,854.47, the amount of the libellant's damages so reported by the said Commissioner, and that the said report as so modified be, and the same is hereby, in all respects confirmed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the libellant Frederick W. Vanderbilt is entitled to, and that he have and is hereby given, full and complete possession and control of said steam yacht "Conqueror," her tackle, apparel and furniture, and that the said yacht, her tackle, apparel and furniture be delivered to the libellant; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the libellant Frederick W. Vanderbilt recover from the respondent J. Sloat Fassett the sum of $20,692.16 his damages, together with interest on the sum of $19,646.76 from the 21st day of June, 1892, the date of the filing of the report of the said Commissioner, to July 20th, 1892, the date of the entry of this decree, such interest amounting to the sum of $91.68, together with the sum of $958.50, the amount of the libellant's costs as taxed, together amounting to the sum of $21,742.34; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that unless an appeal be taken by the said J. Sloat Fassett from this decree within the time limited and prescribed therefor, the libellant's stipulation filed in the Clerk's

Office of this Court, on the 4th day of February, 1892, be canceled.

ADDISON BROWN.

[ENDORSED:] U. S. District Court. Frederick W. Vanderbilt against the steam yacht "Conqueror" and J. Sloat Fassett. Decree. Root & Clarke, Proctors for libellant, 32 Nassau street, New York City, New York. Filed July 20, 1892.

UNITED STATES OF AMERICA, SS.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

[SEAL.] To the Honorable the Judges of the District Court of the United States for the Southern District of New York.

GREETING:

Whereas, lately in the District Court of the United States for the Southern District of New York, before you or some of you, in a cause between Frederick W. Vanderbilt, libellant and appellee, and the steam yacht "Conqueror," her engines, &c., J. Sloat Fassett, claimant and appellant, wherein the decree of the said Court is in the words and figures following, viz.:

"This cause having been heard on the pleadings and proofs of the parties, and having been argued by the advocates for the respective parties hereto, and the Court being of the opinion that the libellant is entitled to a decree for the possession of the said steam yacht 'Conqueror,' her tackle, apparel and furniture; and, that the possession of the said yacht be restored to the libellant and that the libellant recover from the respondent, J. Sloat Fassett, the damages which he has suffered by reason of the matters set forth in the libel,

together with the costs and expenses of this suit to be taxed, and an order having been made by the Court directing that the libellant's damages be assessed by S. H. Lyman, United States Commissioner, who was therein directed to report his conclusions with the evidence to the Court, and that the entry of a final decree herein be reserved till the coming in of the report; and, that the said Commissioner having reported his conclusions with the evidence to the Court, whereby it appears that the libellant's damages amounted to the sum of $20,854.47, and exceptions having been filed to the said report by the respondent; and said exceptions having been heard by this Court and the Court having overruled said exceptions, except certain thereof the items of damages objected to in the exception so sustained, amounting in all to the sum of $162.31, which sum the Court directed should be deducted from the amount of damages assessed by the said Commissioner.

"Now, on motion of Root & Clarke, proctors for the libellant,

"It is ordered that the sum of $162.31 be deducted from the said sum of $20,854.47, the amount of the libellant's damages so reported by the said Commissioner, and that the said report as so modified be, and the same is hereby, in all respects confirmed; and

"It is further ordered, adjudged and decreed that the libellant Frederick W. Vanderbilt is entitled to, and that he have, and is hereby given, full and complete possession and control of said steam yacht "Conqueror," her tackle, apparel and furniture, and that the said yacht, her tackle, apparel and furniture, be delivered to the libellant; and

"It is further ordered, adjudged and decreed that the libellant Frederick W. Vanderbilt recover from the respondent J. Sloat Fassett the sum of $20,692.16, his damages, together with interest on the sum of $19,646.76 from the 21st day of June, 1892, the date of the filing of the report of the said Commissioner, to July 20th,

1892, the date of the entry of this decree, such interest amounting to the sum of $91.68, together with the sum of $958.50, the amount of the libellant's costs as taxed, together amounting to the sum of $21,742.34; and

"It is further ordered, adjudged and decreed that, unless an appeal be taken by the said J. Sloat Fassett from this decree within the time limited and prescribed therefor, the libellant's stipulation, filed in the Clerk's Office of this Court on the 4th day of February, 1892, be canceled.

(Sgd.) "ADDISON BROWN."

as by the inspection of the transcript of the record of the said Court, which was brought into the United States Circuit Court of Appeals for the Second Circuit by virtue of an appeal agreeably to the Act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present Term of October, in the year of our Lord one thousand eight hundred and ninety-two, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here by the Court ORDERED, ADJUDGED AND DECREED that the said decree of said District Court be, and the same hereby is, in all things affirmed, with costs to the said Frederick W. Vanderbilt, libellant and appellee, taxed at the sum of $75.84 by the Clerk of this Court, and to be recovered by said appellee in said District Court.

June 7, 1893.

You, therefore, are hereby commanded that such further proceedings be had in said cause as, according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witnes, the Honorable MELVILLE W. FULLER, Chief Justice of said Supreme Court, the seventh day of June,

in the year of our Lord one thousand eight hundred and ninety-three.

Costs of Appellee:

Clerk	$12 55
Printing brief	37 91
Attorney	25 00
Notary	38
	$75 84

JOHN A. SHIELDS,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Correct.
E. M.,
U. S. Atty.

[ENDORSED:] United States Circuit Court of Appeals for the Second Circuit. No. 125, October Term, 1892. Frederick W. Vanderbilt vs. Steam Yacht "Conqueror," &c. Mandate.
Filed June 19, 1893.

United States Circuit Court of Appeals, Second Circuit. } October Term, 1892.

Costs of Frederick W. Vanderbilt, Appellee, in No. 125:

1892, October Term, appearances, .50	$ 50
Filing papers, .55	55
Notary fees, .38	38
Filing briefs, $5; judgment, $1.50	6 50
Mandate, $5	5 00
Cost of printing brief, $37.91	37 91
Attorney's docket fee, $20; attorney's removal fee, $5	25 00
	$75 84

Test:
JOHN A. SHIELDS,
Clerk U. S. Circuit Court of Appeals, Second Circuit.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

FREDERICK W. VANDERBILT

AGAINST

THE STEAM YACHT CONQUEROR, HER TACKLE, &c., and J. SLOAT FASSETT.

The proctors for the libellant having this day (June 13, '93) presented to this Court the mandate of the United States Circuit Court of Appeals for the Second Circuit, wherein it is recited that the decree of this Court in this cause having been brought by an appeal into the said Circuit Court of Appeals, and that, on consideration thereof, it has been ordered, adjudged and decreed by said Court in the words and figures following, namely :

> "It is now here by the Court ordered, adjudged and decreed that the said decree of said District Court be, and the same hereby is, in all things affirmed, with costs to the said Frederick W. Vanderbilt, libellant and appellee, taxed at the sum of $75.84 by the Clerk of this Court, and to be recovered by said appellee in said District Court. June 7th, 1893 ; "

and in and by which mandate this Court is commanded that such further proceedings be had in this case as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding :

Now, therefore, on motion of Root & Clarke, proctors

for the libellant, no objection being made by the District Attorney, proctor for the claimant and respondent,

IT IS ORDERED:

I. That the said mandate be filed.

II. That the judgment of the said Circuit Court of Appeals recited in said mandate be and the same hereby is made the judgment of this Court.

III. That in addition to the sum specified in the decree of this Court so affirmed as aforesaid to be recovered by the libellant Frederick W. Vanderbilt as damages and costs from the respondent J. Sloat Fassett, the said Vanderbilt do recover from the said Fassett the further sum of $75.84, said Vanderbilt's costs upon the said appeal as taxed.

IV. That the stipulation for libellant's costs in this cause, filed and recorded on or about September 1st, 1891, be canceled of record and that the stipulators therein, F. W. Vanderbilt and Edward H. Wales, be, and they are, hereby released and exonerated from all liability on said stipulation.

V. That the stipulation for value, filed and recorded by the libellant herein on or about February 4th, 1892, be canceled of record and that the stipulators therein, F. W. Vanderbilt and Chauncey M. Depew, be, and they are, hereby released and exonerated from all liability on said stipulation.

ADDISON BROWN.

Approved as to form. E. M.

[ENDORSED:] U. S. District Court, Southern Dist. of N. Y., Frederick W. Vanderbilt against the steam yact "Conqueror," her tackle, &c., and J. Sloat Fassett. Order on mandate. Root & Clarke, proctors for libellant, 32 Nassau street, New York City, New York. Filed June 19, 1893.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE STEAM YACHT "CONQUEROR," HER tackle, apparel, and furniture; J. Sloat Fassett, claimant, appellant.

v.

FREDERICK W. VANDERBILT.

No. 98.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE STEAM YACHT "CONQUEROR," HER tackle, apparel, and furniture; J. Sloat Fassett, claimant, appellant, v. FREDERICK W. VANDERBILT.	No. 98.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLANT.

Frederick W. Vanderbilt, the appellee, owner of the steam yacht *Conqueror*, commenced this proceeding by libel in admiralty to recover possession of his yacht, which was being held by the customs officials. J. Sloat Fassett, the claimant and present appellant, was at the time when the libel was filed collector of customs for the district of New York. Vanderbilt having been successful upon the hearing before Judge Addison Brown in the district court, Fassett appealed to the circuit court of

appeals, which affirmed the decree in all respects. Fassett then applied to this court for a writ of *certiorari* and obtained it.

The questions in this case are: First, whether the writ of *certiorari* was granted in time (I); second, whether a foreign-built yacht, upon transfer to an American citizen and arrival at an American port, can properly be seized as an imported article within the meaning of the tariff laws (II, III); third, whether a collector who has seized such a yacht upon probable cause, and held her for payment of duties, can be subjected to such a mulct in damages as was contained in the decree in this proceeding (IV, V, VI).

STATEMENT OF FACTS.

The relevant facts, as we understand them, are as follows:

Frederick W. Vanderbilt, the appellee in this proceeding, is a native-born American citizen (p. 27). In May, 1891, he purchased the foreign-built yacht *Conqueror* from its owner, one Bailey, of the town or borough of Kingston-upon-Hull. The purchase money was £15,550, or about $75,000. The transfer was executed in London on May 7, 1891, and on the following day the bill of sale was certified by the United States consul at Liverpool, who further certified "that Frederick W. Vanderbilt, therein mentioned as purchaser of the vessel, is a citizen of the United States." The yacht was delivered to Mr. Vanderbilt at Hull (pp. 27, 45–6). The vessel was designed for pleasure only, and has never

been put to any other use (p. 28); nor does it appear that Vanderbilt ever even intended to let it to any other pleasure seeker.

After the purchase of the yacht Mr. Vanderbilt cruised in her for some time, going as far as Norway, and then returned to England. On June 16, 1891, he was elected a member of the Royal Mersey Yacht Club of Liverpool, thus obtaining the right to fly the blue ensign of Her Majesty's fleet. He never did, however, fly a British flag, but always carried the ensign of the New York Yacht Club, his home club (pp. 27–30, 37, 48–9). The yacht did not even go to Liverpool (p. 31.) Its enrolment (p. 55) on the Liverpool yacht club list seems to have been with the intent to claim special privileges here under Revised Statutes, § 4216 (see p. 32).

Shortly after this occurrence the yacht crossed the ocean, and, after putting in at Halifax, arrived at New York about July 6, 1891. She then received from the deputy collector another certificate to the bill of sale, which certificate also stated that the yacht was foreign built, and that Vanderbilt was a citizen of the United States (pp. 35, 43–4).

After some further cruising about our coast, she went to Communipaw to coal up. While there the captain received notice from Collector Fassett, through Mr. Vanderbilt, that he desired to seize her as an imported article. For that purpose she was brought around to Stapleton, in the waters of Richmond County, N. Y., on August 27, 1891 (pp. 36, 38, 39, 41).

HISTORY OF THIS SUIT.

Upon the yacht's first arrival no attempt had been made to seize her as a dutiable article. She had simply been charged "light money," a proper charge and immaterial to this proceeding, as will hereinafter be shown.

On August 14, however, the Solicitor of the Treasury gave an opinion to the effect that she was dutiable. Assistant Secretary Nettleton accordingly directed the collector to "take the necessary steps for the appraisement of said vessel for duty and the assessment and collection of duty thereupon according to law." These directions were conveyed to the surveyor of the port, the collector saying (p. 59):

> As Mr. Vanderbilt, through his attorneys, refuses to make a voluntary entry of the said yacht, it becomes necessary for this office to take possession of the same on behalf of the United States. I therefore have to request that you, without delay, place a sufficient number of officers on board the yacht to assure her safe custody, and to report your action to this office.

Possession was accordingly taken on August 27, 1891, and during the following month the yacht remained in the possession either of Mr. Fassett or of Mr. Couch, the acting collector (p. 12). On October 1 Mr. Fassett went out of office and was succeeded by Francis Hendricks, to whom the possession passed (p. 13). From August 27 until October 8 the vessel remained continuously in the custody of customs officers, acting under directions from Messrs. Fassett, Couch, and Hendricks, the successive heads of the office (pp. 13–22).

Meanwhile, on September 1, the libel in the present suit was filed by Mr. Vanderbilt, as owner of the yacht, through his proctors (pp. 2–5). It was directed against "all persons intervening for their interest therein, and against J. Sloat Fassett, who is now in possession thereof." It alleged libelant's citizenship and the fact that the vessel was constructed, used, and intended to be used "as a pleasure yacht only;" its ownership by libelant, the payment of light money, the collector's certificate to the bill of sale, and that "said bill of sale so certified is a regular document issued from a custom-house of the United States, proving said yacht to be American property;" its membership in the Royal Mersey Yacht Club, and claim to special privileges under Rev. St., § 4216; its seizure off Stapleton as a dutiable article (which seizure is ascribed to Mr. Fassett in the libel); that it was not an imported article, and Fassett's possession was illegal. It prayed process against the vessel, her tackle, apparel, and furniture, and against Fassett personally; "and that the said vessel, her tackle, apparel, and furniture, may be delivered to this libelant, and that the said J. Sloat Fassett may be condemned to pay to libelant his damages and costs in the premises; and that the libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive."

Process having been issued against the vessel, the United States marshal claimed to have duly served it (p. 7); but as a matter of fact his deputy was resisted by the customs officials, and the marshal's claim of possession of the vessel was disputed (pp. 8, 10, 12, 13). On

September 29, at request of the captain of the yacht, and pursuant to instructions of the Secretary of the Treasury, she was removed, for greater safety, to the Erie Basin, which is in the city of Brooklyn, Kings County, N. Y. (pp. 14, 43, 104). On that day, and after her removal to the Erie Basin, the marshal again attempted to get possession, but was resisted by the customs officials (p. 13). On October 8, "it appearing to the court to be doubtful whether the marshal's attachment is sufficient for the purposes of this suit," Judge Brown directed another process to issue (p. 20). The marshal accordingly took possession, by his deputies, in a manner described by the customs inspector as follows: "After some parleying, they said they would put me off the vessel, which they proceeded to do, laying hands upon me for the purpose and accomplishing the same with an exhibition of force which I was unable to resist. They thrust me off the vessel outside the rail and to the shore, against my protest, which I repeatedly made" (p. 22).

The waters of Richmond County, where the vessel originally lay, are not within the southern district of New York (Rev. St., § 541), but the seizure of October 8 was held by Judge Brown to give jurisdiction to the court (p. 87).

Answers were filed on October 15, by Mr. Fassett as "late collector" and personally, and by Mr. Hendricks as collector (pp. 23–6). Mr. Fassett in both his answers admitted that he had had possession of the yacht, and in his official answer stated that he had taken possession of it under and by virtue of the revenue laws of the United

States, and that it had since been in the possession of "the collector of customs." In both answers he prayed that the libel be dismissed with costs, and that the court "otherwise right and justice administer in the premises." In his official answer he also prayed "that this honorable court decree restitution of the possession of said yacht to the collector of customs at the port of New York."

Mr. Hendricks in his official answer also intervened on behalf of the United States. He alleged that Mr. Fassett, as collector and not otherwise, took possession of the yacht on August 27 for the enforcement of payment of duties; that "the collector of customs" was in actual possession from August 27 to October 8; that on the latter date actual possession was taken, by force, by the deputy marshal; but that "the collector" claims still to be in lawful possession. He prayed substantially the same relief as was prayed by Mr. Fassett in his official answer. The prayer for restitution was as follows: "Wherefore, the said attorney on behalf of the United States prays * * * a restitution of the said yacht to him as collector of customs at the port of New York." On October 19, Fassett filed a petition in this court for a writ of prohibition, claiming that the admiralty court had no jurisdiction, and that the libelant's remedy was by application to the Board of General Appraisers under the customs administrative act (pp. 66–73.) The question was argued in December, and decided January 11, 1892 (*In re Fassett*, 142 U. S., 479). The opinion of Mr. Justice Blatchford refusing the writ of prohibition is reprinted in the present record at pp. 77–83.

The taking of evidence then commenced (p. 27); and the proceeding was pushed through so rapidly that Judge Brown's order directing the marshal to put the libelant in possession of the yacht bears date January 29 (p. 94). Judge Brown's opinion is printed at pp. 86–94. On the same day the court ordered "that the libelant's damages be assessed by S. H. Lyman, U. S. commissioner, who shall report his conclusions, with the evidence, to the court, and that the entry of a final decree herein be reserved till the coming in of the report or till further order." The proceedings before the commissioner will be hereinafter described (V, *infra*). They ended in a report giving $15,000, or about 20% of the cost of the vessel, by way of demurrage for the period of its detention (August 27 to February 3). The report also included other items sufficient to make up a total charge of $20,854.47 (pp. 117–18). On exceptions it was sustained by Judge Brown, except as to $162.31 (p. 120); and a final decree for this sum, with interest and costs, amounting in all to $21,742.34, was thereupon entered (p. 121).

Fassett thereupon appealed (p. 122), but the decree was in all things affirmed by the circuit court of appeals (p. 127). The judgment of the court of appeals was dated June 6, 1893, and an indorsement on the papers states that mandate was issued on the following day (p. 128). This indorsement is not signed, and its official character does not appear. The present writ of *certiorari* was applied for April 16, 1894, and issued May 3, 1894. Return was made November 9, 1894 (p. 1).

ASSIGNMENT OF ERRORS.

We call attention to all of the errors in the decree assigned by appellant upon his appeal to the circuit court of appeals (pp. 124–5):

> [1] In that it ordered, adjudged, and decreed that the libelant is entitled to and that he have and is given full and complete possession and control of said steam yacht "Conqueror," her tackle, apparel, and furniture, and that the said yacht, her tackle, apparel, and furniture, be delivered to the libelant.
>
> [2] In that it ordered, adjudged, and decreed that the libelant, Frederick W. Vanderbilt, recover from the respondent, J. Sloat Fassett, the amount of $21,742.34 for his damages, interest, and costs.
>
> [3] In that it did not make a decree dismissing said libel and restoring the possession of said yacht to the claimant, or to Francis Hendricks, his successor in office as collector of customs at the port of New York, for the enforcement of the payment of duties, due and unpaid thereon, under the customs revenue laws of the United States.

Particularizing under the second of said assignments, we call attention to the following allowances, the question of whose propriety is raised by exceptions to the Commissioner's report (p. 119):

> [4] The sum of $15,000 for loss of use of boat while detained by the respondent, from August 27, 1891, to February 3, 1892, at $100 a day, and interest on same.
>
> [5] The sum of $3,336.61 for expenses during detention for payment of crew and master of vessel, and interest on same.
>
> [6] The sum of $1,251.19 for payment for provisions for crew * * * and interest on same.

We further assign for error:

[7] So much of the decree as represents damages after October 1, 1891, when the detention affirmatively appears to have been made by Francis Hendricks, successor in office of the appellant.

[8] So much of the decree as represents expenses after October 8, 1891, when the marshal was in charge of the vessel.

All questions relating to items of damage seem to have been regarded by the district attorney as covered by his second assignment. For greater caution, however, we particularize them as above; and if the general assignment is regarded as insufficient, we respectfully ask this court to take notice of them. There seems to be no statute or rule of court applicable to assignments of error in support of a writ of *certiorari*. Rev. St., § 997, Rule 21 and Rule 35 have no application.

ARGUMENT.

I.

The writ of certiorari was applied for and granted in time.

Counsel for the appellee, when the application for this writ was made by Solicitor General Maxwell, objected on the ground that it was too late, and argued the point at length in their brief. We understand that, in granting the writ, this court passed upon the objection and overruled it. Since, however, it is still pressed, we submit an argument upon it.

Two objections are made: First, that the mandate of the circuit court of appeals had issued; second, that the term at which the cause was decided by that court had expired.

(1) *As to the mandate.* This record contains no proof as to when the mandate was actually issued. The note at p. 128 is not certified in any manner. Assuming, however, that the mandate did actually issue on June 7, 1893, it is immaterial. The record remains with the court of appeals. Its clerk finds no difficulty in certifying "a true and complete transcript of the record and proceedings * * * as the same remain of record and on file in said office" (p. 1). Nothing is omitted which is essential to a determination of the cause.

It would certainly be most extraordinary if the right of this court to issue a writ of *certiorari* could be cut off by the judges of the circuit courts of appeals by immediate issuance of the mandate; especially when, as in the present case, the decision of the lower court and issuance of the mandate occur during the summer vacation of this court.

No practical difficulty is caused by the fact that the mandate has gone down. It is the present duty of the district court to obey the determination of the circuit court of appeals (§ 10, last clause). But if this court shall decide that that determination is erroneous it may send its mandate directly to the district court, whose action will thus be controlled (§ 10, second clause). No embarrassment is caused by the fact that the intermediate

court is *functus officio*. It may be, indeed, that the sureties in the stipulation for costs have been discharged by the appellee's haste and the appellant's deliberation. If so, the appellant must take his chances of the appellee's personal solvency.

It has been the practice of this court to regard the issuance of the mandate as immaterial. The point was insisted upon, as above said, at the time of the present application, and without success.

In *The Haytian Republic*, 154 U. S., 118, as appears by the papers on file, the mandate issued December 18, 1893, while the petition of the United States for the writ of *certiorari* was filed March 5, 1894. The Solicitor General, in applying for the writ, called attention to the fact that the circuit court of appeals had refused to withhold its mandate, basing upon this his prayer for an early hearing, "so that the vessel may be retaken promptly if the judgment is reversed." Senator Mitchell, in his full argument in opposition to the application, made no point of this; and it was not adverted to by the court. We have not examined the records of the numerous private cases in which writs of *certiorari* have been granted, but doubtless some of them would show similar states of facts.

(2) *As to the term of court.* There is no statutory provision indicating that a writ of *certiorari* must be granted or applied for during any particular term of the circuit court of appeals. Such a statute would restrict the jurisdiction of this court whenever the decision of the lower court and the expiration of the then pending term of that court should both occur during a recess of this

court. While there is no limitation of time for these applications mentioned in the circuit court of appeals act, the limitations for appeals and writs of error designated by that act have no relation to terms of court. A term of court is a purely arbitrary thing. It is an ancient institution which, so far as it had operated to limit rights of suitors, has done much harm as well as good. It is difficult to explain why in cases decided at the beginning of the term there should be ample opportunity to file petitions for rehearing, while counsel must be present in court on the last day of the term with petitions ready drawn for the rehearing of causes to be decided on that day, or else abandon their clients' defense. No recent legislation with reference to time limitations, it is believed, has had any reference to this ancient institution. Recent legislation measures time for appealing or taking other legal steps by days, months, or years.

The expiration of a term of court is no restraint upon the court whose term expires. By order entered during the term it may extend its own power to entertain petitions for a rehearing, or issue mandates; and it may likewise extend its own power to make bills of exceptions. (*Chattanooga Ore and Iron Co., petitioner*, 128 U. S., 544.) It is impossible to believe that Congress should have intended to make the time within which this court could issue a writ of *certiorari* dependent upon the will of the lower court; yet the lower court, and not this court, decides when the term shall expire. (Act of March 3, 1891, ch. 517, § 3.)

This court seems to have acted in the past on the theory that it had ample time after the decision of a cause in the circuit court of appeals to decide whether or not a writ of *certiorari* should issue. An application made pending the hearing in the latter court was denied "without prejudice" in *United States* v. *Steamship Ilsta*, 149 U. S., 789; and in *American Construction Co.* v. *Jacksonville Ry.*, 148 U. S., 372, 385, Mr. Justice Gray said that "this power would seldom be exercised before final judgment in the circuit court of appeals."

Congress has provided a limitation of one year upon appeals and writs of error to this court from the circuit court of appeals. (Act of 1891, § 6.) Upon application for a writ of *certiorari* it may order a cause to be certified "for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." (Id.) If there be any limitation upon the power of this court to issue a writ of *certiorari*, it would seem to be, by analogy, the same limitation as in the case of appeals and writs of error.

II.

The yacht "Conqueror" was a dutiable article under the McKinley tariff act.

The opinion of the learned district judge was based largely on what he supposed to be the history of our tariff and navigation laws since 1789. It is believed that his information as to the history of this legislation was imperfect; that there never has been a practical

construction established which can control the decision of the present case; that the case is one of new impression, to be decided by an inspection of the statutes in force when this controversy arose in 1891; and that under these statutes the yacht was dutiable.

We shall endeavor to show (1) that a vessel is an "article" within the meaning of the tariff laws; (2) that failure specifically to mention it is immaterial; (3) that it becomes an import when it changes its flag and obtains the right to claim American citizenship; (4) that this yacht, with its change of flag, came within the language of the tariff act, and therefore is liable to duties, unless that language is controlled by other provisions in the statute book. We shall endeavor further to show (5) that the special provision concerning foreign yachts does not affect the present case; (6) that the receipt of light money by the deputy collector is not material; (7) that the tonnage duties upon shipping are not material; and (8) that the historical arguments of the learned district judge are based upon imperfect information.

(1) *A vessel is an "article" within the meaning of the tariff laws.*

The early tariff acts, in their residuary or "catch" clauses, used the words "goods, wares, and merchandise," and used them in such a way as to indicate an intent that vessels were not to be considered as included. (Acts of July 4, 1789, §§ 1, 5; Aug. 10, 1790, c. 39, §§ 1, 2; May 2, 1792, c. 27, §§ 4, 5.) By the tariff of 1816 all duties on "goods, wares, and merchandise" were made to "cease

and determine," and thereafter the more general word "articles" was used in the residuary clause. (Act of April 27, 1816, c. 107, § 1.)

The McKinley tariff act (like its predecessors for three-quarters of a century), in its general provisions, drops the phrase "goods, wares, and merchandise" and substitutes the word "articles." It first provides certain rates of duty "on all *articles* imported from foreign countries and mentioned in the schedules herein contained." (§ 1.) It then provides that certain "*articles*, when imported, shall be exempt from duty." (§ 2.) It then imposes a general exaction of 10 per cent ad valorem on "the importation of all raw or unmanufactured *articles* not enumerated or provided for in this act," and of 20 per cent "on all *articles* manufactured in whole or in part not provided for in this act."

When, however, the subject of discriminating duties is reached, the word "articles" is dropped, and the act (like its predecessors since 1816) substantially retains the original phraseology of 1789, which provides such a duty "on all goods, wares, or merchandise which shall be imported in vessels not of the United States," except "goods, wares, and merchandise" imported in certain favored vessels (§ 17); and prohibits importation of "goods, wares, or merchandise" from foreign ports "except in vessels of the United States or in such foreign vessels" as are specially mentioned. (§ 18; see also § 23.)

It will thus be perceived that in 1890, as in 1789, Congress used the word "vessel" as if it were not included by the phrase "goods, wares, and merchandise." That

phrase in its broadest meaning would indeed include a vessel, together with all other chattels; but it sometimes, as here, is shown by the context to have a restrictive meaning. (See 1 Bouvier Law Diet., 15th edition, p. 714; 1 Rapalje & Lawrence Law Diet., p. 573; *Chamberlain* v. *Western Transportation Co.*, 44 N. Y., 305, 310.)

The tariff acts of 1789 and 1890 indicate clearly that the phrase "goods, wares, and merchandise" had the same meaning in both; that vessels were excluded in both, and that the phrase in 1789 included all the imports then dutiable. It also appears from a comparison of the different sections of the act of 1890 that its scope was intended to be broader than that of its first predecessor; and no fact of recent political history is more familiar than the intent of Congress, in passing the McKinley act, to impose duties upon every import, of whatever nature or kind, which was not specifically excluded. In using the word "article" they have used a term of the most general and sweeping application. (See *Junge* v. *Hedden*, 37 Fed. Rep., 197, 198; 146 U. S., 233.)

It is true that the word "merchandise," standing alone, seems to be used in some of our other tariff legislation, as in the customs administrative act, to include all importable articles. This ambiguous word, however, is used in different significations. Thus, in § 3111 it includes sea stores, while in § 3113 it excludes them. In § 2766 the revisers with wholesome caution say that it "may include" all importable "goods, wares, and chattels," while in § 2795 it is contradistinguished both from sea stores and apparently also from goods imported

for sale. In the well-known act of March 3, 1875, c. 136, § 1, it is contradistinguished from personal and household effects and other non-dutiable articles. Clearly the phrase "goods, wares, or merchandise" must be construed everywhere independently, as we have construed it, by reference to the immediate context, whether or not it means something different from "merchandise" simply, as would appear from the act of July 18, 1866, c. 201, § 9.

Hence, considering the language of the McKinley act both by itself alone and in comparison with the earlier acts *in pari materia*, the word "articles" appears to be a generic term, of which "vessels" and the "goods, wares, or merchandise" carried thereon are subclasses.

Whether the legislators of 1890 did or did not have foreign-built vessels distinctly in mind is not essential. Their language is made very general, in order to provide against their own forgetfulness. And it even applies to goods not known to trade when the tariff was enacted. (*Newman* v. *Arthur*, 109 U. S., 132, 138.)

For reasons which will hereinafter be explained, the question of dutiable imports has been one not likely to arise for decision until recently. It has never come up for judicial decision except in the present case. There have, however, been a few Treasury decisions which are worthy of mention.

In August, 1891, the yacht *Madge* was brought over on the deck of an ocean steamer for racing purposes. Secretary Windom, without any discussion of the questions involved, decided that she was not dutiable under

such circumstances (Syn. Dec., 4960). She was afterwards sold to a citizen of the United States, and duty was then collected from the purchaser. The learned counsel for appellant says that she was a small craft. But there is no line to be drawn between large craft and small craft. They are not "coterminous classes," but members of the same class.

A similar boat imported in 1886 was granted free entry by Secretary Fairchild, not because it was not an imported article, but because it was a "household effect" (Syn. Dec., 7611). The same Secretary had previously levied duty on "a steamboat with nets and other equipments" and upon canoes. In neither of these cases had the owners claimed that the articles in question were not imports (Syn. Dec., 7048, 7061), and the same ruling was repeated in two cases of "a steam pleasure yacht" claimed by the owner to be entitled to free entry as a household or personal effect (Syn. Dec., 7937, 8901).

The act of March 3, 1879, c. 193, authorized the granting of an American registry to the Canadian steam ferryboat *Geneva* "upon the payment into the United States Treasury of the duties legally chargeable upon said vessel." The owners failed to avail themselves of the privilege of the act until 1888, when they claimed that she was entitled to free entry; but the claim was overruled by Assistant Secretary Maynard. (Syn. Dec., 8975.)

These published decisions are thoroughly familiar to the framers of subsequent tariff laws. Hence there is some weight in the presumption that if Congress did not

intend that yachts should be dutiable it would have said so. (18 Op., 532–3, cited in *Excashaw* v. *Cadwalader*, 145 U. S., at p. 258; 20 Op., 721.)

There is no reason why a vessel should not be regarded as an "article" subject to duty when imported. When it is built in this country the materials of which it is built are dutiable unless the vessel is to be used exclusively in foreign trade. (Tariff of 1890, §§ 8, 9.) An act of 1866 levied duty upon its equipments, including boats, and upon the expenses of repairs made in foreign countries. (Rev. St., § 3114.)

An act of 1874, which is still law, recognizes the dutiability of boats "provided with sails or propelling machinery of their own, adapted to lake or coastwise navigation." (Act of April 18, 1874, c. 110.) It provides that the enrolment act of 1793 shall not apply—

> To canal boats, or boats employed on the internal waters or canals of any State, and all such boats, *excepting only such as are provided with sails or propelling machinery* [&c.], and excepting such as are employed in trade with the Canadas, shall be exempt from the provisions of the said act, and from *the payment of all customs* and other fees under any act of Congress.

(2) *Failure specifically to mention vessels among dutiable articles is immaterial.*

The vessel was properly seized, if dutiable at all. If not entitled to free entry, and not otherwise specifically mentioned, she comes within § 4, the "catch clause." The learned district judge argues that this can not be, because she is neither manufactured nor unmanufactured,

but a "structure," like a house. The undersigned has seen a house moved, as an entirety, at sea upon a barge. Suppose a house were imported across the St. Lawrence in this way. Would it not be dutiable? In the Birtwell case, Solicitor General Jenks held that the floor frame of a Government building, being a structure, could not be a manufacture (18 Op., 475), but Judge Colt overruled him. (*Birtwell* v. *Saltonstall*, 39 Fed. Rep., 383; reversed on other grounds in 150 U. S., 417.) Nobody suggested that the floor frame should be upon the free list because not specifically mentioned. The free list is designed to include articles specially remembered, not articles forgotten.

The learned judge's argument is thus reduced to the supposed unlikelihood of omitting special mention of vessels because their importation is so common. But, as we shall show, their importation is extremely rare, and questions of dutiability could arise only after the revision of the statutes in 1874. It then arose and was settled under existing general provisions, without difficulty so far as the rate of duty was concerned. Why should Congress not leave well enough alone?

(3) *A foreign-built vessel has become an import when she has entered an American harbor under the American flag, with official papers showing American citizenship and a right to American protection.*

Whether the transfer of property alone, without entrance into an American harbor, would be sufficient, is not a question necessary to the present case.

And the fact that the vessel is not actually landed on American soil is irrelevant. An article can be imported without being landed. The *Great Eastern*, after proving a failure as a commercial venture, was anchored in the Mersey and used there as a pleasure resort. Can there be any doubt that the tea, coffee, tobacco, and liquor sold aboard of her were dutiable whether or not they had first actually touched British soil? In *Hartranft* v. *Oliver*, 125 U. S., 525, 528, it was held that "goods on board of a ship in charge of a custom-house officer" are "in the same position as if technically in a public store or bonded warehouse." (See also *Saltonstall* v. *Russell*, 152 U. S., 628, 631; *Schoeger* v. *Schweger*, 153 U. S., 609, 612–3.)

Neither is it material whether the vessel propels herself into American waters or whether she is carried upon the deck of another vessel. It would certainly seem unreasonable to rule that the *Madge* was dutiable because she came over from England on the deck of an ocean steamer, if she would have been entitled to free entry had she sailed over on her own keel. Yet this is the distinction taken by the learned district judge (p. 89). Vessels and boats are not the only articles which come into the country without being carried. Animals are driven across the Mexican frontier. Logs are floated across the Canadian frontier. A litigation has been for some time pending over natural gas which propels itself through a pipe laid under the Niagara River. All of these are imported articles within the meaning of the tariff acts, and they are all dutiable unless specifically mentioned in the free list.

It is, however, urged that the same reasoning would apply to every vessel, American or foreign, which enters

the port of New York from abroad, no matter how often in a year she may enter; and that by levying duties in such cases ocean transportation would be made a ruinous business and commerce would be destroyed. This question was argued and left undecided when the present controversy was previously before this court. (*Incre Fassett*, 142 U. S., 479.) The argument of Solicitor General Taft in that case was as follows:

> We are asked to distinguish this case from the case of a foreign ship which comes into a port of this country and goes out again. The distinction is apparent. The deck of a foreign merchant ship, in the comity which exists between nations, is regarded as more or less within the jurisdiction of the country whose flag she flies. When she enters the port of another country it is with the intention of her master and owner to make such port but a temporary stopping place. By treaty usually, and by comity always, her entering the port is not regarded as an importation of a ship, but only an importation of the cargo she carries. Commercial treaties exist with respect to almost every civilized nation on the globe, securing the free entries of ships into the ports of this country. A foreign ship is owned abroad. Her registry and the record of her title are in a foreign place and nation. Her home is elsewhere. Therefore it is that her coming into the ports of this country for a temporary purpose is not, within the tariff laws, considered an importation.

It is respectfully submitted that this argument is conclusive. A ship at sea is deemed to be part of the nation whose flag she has the right to fly. (*Cragin* v. *Kelly*, 16 Wall., 610, 624–8; *Wilson* v. *McNamee*, 102 U. S., 572,

574; *Case of the Chinese Cabin Waiter*, 7 Sawy., 536, 540; *United States* v. *Rodgers*, 150 U. S., 249, 260, 264–5; *St. Clair* v. *United States*, 154 U. S., 134–152; 1 Wharton's Intern. Law Digest, 115, 116, 124; *The Queen* v. *Anderson*, *infra*; *The Queen* v. *Carr*, 10 Q. B. D., 76, 85; Bar's Intern. Law, §§ 60, 115; Boyd's Wheaton's Intern. Law, pp. 166, 170; auth. cit. by Messrs. Coudert and Jones in *Wildenhus's Case*, 120 U. S., at pp. 6, 7.) "The constructive territory of the United States embraces vessels sailing under their flag" (*United States* v. *Smiley*, 6 Sawy., 640, 645).

In *The Queen* v. *Anderson*, L. R., 1, C. C. R., 161, Mr. Justice Blackburn said (p. 163):

> It has been decided that a ship which bears the nation's flag is to be treated as a part of the territory of that nation. A ship is a kind of floating island.

Mr. Justice Byles said (p. 168):

> I retain the opinion I expressed at the trial. I told the jury that the ship, being a British ship, was, under the circumstances, a floating island, where the British law prevailed.

For many purposes she is also regarded as a part of her own country, even when within a foreign port. (1 Kent Comm., 26.) In the *Case of the Chinese Cabin Waiter*, *supra*, Mr. Justice Field lays down the proposition in broad terms:

> An American vessel is deemed to be a part of the territory of the State within which its home port is situated, and as such, a part of the territory of the United States.

Her crew are not, therefore, subject to the foreign criminal law, "except where the offense is against the law of nations," or it "affect the peace of the port or persons disconnected from the vessel" (id. at p. 541, citing 8 Op., 73); except it "involve the peace or dignity of the country or the tranquillity of the port." (Chief Justice Waite in *Wildenhus's Case*, 120 U. S., 1, 12.) This is also the doctrine in France (Hall's Intern. Law, ed. 1895, pp. 209–12).

In *Cooper* v. *Kelly*, *supra*, at page 626, Mr. Justice Hunt cites Bluntschli as follows:

> Ships are to be regarded as floating sections of the land to which they naturally belong and whose flag they are entitled to carry.

In *United States* v. *Rodgers*, *supra*, the court quote from a letter of Daniel Webster to Lord Ashburton that—

> Enlightened nations in modern times do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself.

Mr. Hall thinks that the letter of Mr. Webster which contains these words went beyond the authorities, but says: "The amount of authority which could be adduced in favor of his doctrine at that time was distinctly less than that by which it is now supported." (Hall's Intern. Law, ed. 1895, p. 210, note.) Of the doctrine, in its

application to the discipline of merchant vessels on the high seas, he says that the indications "point toward the proximate formation of a uniform custom which would be reasonable in the abstract and singularly little open to practical objections." (Id., p. 212.) Although he disapproves the doctrine of the territoriality of merchant vessels, he concedes that it is probably adopted definitively by several States (id., pp. 259–61) including the United States (p. 262, note).

While, for the purposes stated by Mr. Justice Field and Chief Justice Waite, a foreign vessel in an American port is subject to our domestic criminal laws, and while, if desiring to land goods, she is obliged to comply with the requirements of our customs laws, and while she is also obliged to comply with our navigation laws, and, indeed, with any other laws which we choose to make applicable, she has never, in this or any other country, been regarded as herself an import. She retains enough of her foreign character to prevent this; and, conversely, an American vessel going on a foreign voyage remains sufficiently within American jurisdiction to prevent her becoming an export when leaving or an import when returning.

If, however, the arrival of a foreign-built vessel is accompanied with a complete abandonment of her foreign character, and a complete absorption into the American marine, there is no reason why she should not be regarded as an import.

Two opinions of Mr. Justice Story at circuit are relied upon to the contrary.

The remarks which have been quoted from Judge Ware, although they received the approval of Mr. Justice Story in *The Geertruda*, 3 Story, 68, were not necessary to the decision of the case. That was a libel for forfeiture under the Collection Act of March 2, 1799, c. 22, § 50, for having unladen certain articles from a vessel without special license. The articles had formed part of her tackle. The unlading was forced by wreck, so that the statute, as it had been authoritatively construed in *Peisch v. Ware*, 4 Cranch, 347, was inapplicable; and the court so decided. The opinion contains, however, a further and unnecessary ground of decision, based upon a very strict construction of the statute under consideration, holding also *arguendo* that no part of a vessel or her tackle is dutiable. This part of the opinion is the main precedent relied upon by the appellee; but, if our argument be correct, is based upon misconception, due probably to the fact hereinafter shown that, owing to the condition of our tariff laws down to 1816 and of our navigation laws after 1810, it had never been a practical question whether or not a vessel could become an import; while the question could not come up even *arguendo* except when part of the stores of a vessel might have been offered for sale, a contingency which was supposed to be provided against by § 45 of the act of 1799. The cause is stated to have been but "briefly argued" before Mr. Justice Story, which perhaps accounts for the entire

oversight of the act of March 1, 1823, c. 21, supplementary to the act of 1799, and providing specially for the case of wrecked goods. (§§ 1, 21.)

Had the dutiability of these goods been the question directly submitted to the judges, and had it come before this court for review, with full argument upon the wording and intent of the acts of 1799 and 1823, it can hardly be doubted that the question would have been decided in the affirmative, without need to discuss the dutiability of the vessel from which they were taken.

United States v. *A Chain Cable*, 2 Sumn., 362, held that a cable purchased in Liverpool to replace a worn-out cable in an American ship was not an import upon the ship's next arrival in our ports; and that it did not become so when temporarily loaned for the assistance of another ship. But sea stores to a reasonable amount have almost always been exempted from duty. (Acts of August 4, 1790, c. 35, § 2, and March 2, 1799, c. 22, § 45; Rev. St., §§ 2795–7.)

The learned counsel for the appellee claims that vessels have always been regarded as not imported articles, and refers to the provisions concerning sea stores as supporting his theory. But, if so, why were sea stores expressly placed on the free list almost at the very beginning? (Act of August 10, 1790, c. 39, § 1.) Apparently they had been regarded as dutiable under the tariff of 1789. They have since been regarded as free, so long as legitimately used, by implication of the act of 1799.

(4) *This yacht arrived in port under the American flag and with the right to American protection.*

It is admitted that the owner is a native-born citizen of the United States residing in the city of New York (pp. 2, 24, 27). The boat arrived in port in July, 1891 (pp. 3, 33), carrying the American flag (p. 37). She claimed the right to carry this flag on the warrant of the indorsement on the bill of sale by the American consul at Liverpool (p. 37). This bill of sale is set forth at pp. 45–7, and is accompanied by certificates from Thomas H. Sherman, United States consul at Liverpool, identifying the signature of the vendor, certifying that the purchaser is a citizen of the United States, and further certifying that the bill of sale is executed in accordance with the laws of England. The yacht went into commission at Southampton, England, and never flew the British flag after that (p. 7). Within a week after her arrival in New York she obtained a certificate from the deputy collector to her American ownership indorsed upon the bill of sale; and upon this point the libel makes the following assertion (p. 3):

> That said bill of sale so certified is a regular document, issued from a custom-house of the United States, proving said yacht to be American property.

The yacht is not, indeed, a "vessel of the United States" entitled to the various privileges belonging to craft entitled to that technical name. (Rev. St., § 4131.) But there is no statute prohibiting the American ownership of foreign-built vessels. Vessels so owned are now without doubt entitled to the protection of this Government. Although they can not import goods into the United States, they may export them; they may engage

in commerce between other countries, or they may be used for pleasure. They are expressly recognized by Rev. St., § 4190:

> No sea letter or other document certifying or proving any vessel to be the property of a citizen of the United States shall be issued except to vessels duly registered or enrolled and licensed as vessels of the United States, *or to vessels which shall be wholly owned by citizens of the United States* and furnished with or entitled to sea letters or other custom-house documents.

They are entitled to passports in times of international disturbance. (Rev. St., § 4308.) This yacht, indeed, would seem to be entitled to a license under the act of March 3, 1883, ch. 133; although the somewhat ambiguous phraseology of that act has been, perhaps rightly, otherwise construed by the Treasury Department. (Syn. Dec., 5615.)

Her deck is therefore American territory, and her nationality is American for all purposes. (*The Miranda*, 1 U. S. App., 228.)

(5) *Her membership in a foreign yacht club is not material.*

The Royal Mersey Yacht Club, of which she was made a member a month after her purchase and just before sailing for America, seems to put foreign and domestic yachts upon an equal basis (pp. 49–54). The only club member beside Mr. Vanderbilt whose address is given is an American citizen (p. 55). The vessel belongs also to the New York Yacht Club, and has never flown the Mersey Club ensign (p. 37). She claims some rights under

Rev. Stat., § 4216. It is unnecessary here to consider them; but it is the belief of the undersigned that the section referred to is not applicable to an American yacht which has obtained membership in a foreign yacht club, especially when she has never flown its flag. It would certainly be extraordinary if an American yacht could claim privileges which other American yachts were unable to obtain by joining a club in some country which in effect has entered into a reciprocity treaty with us. Whatever special privileges belong to an American yacht must be found in § 4217, and in § 4214 as amended by the act of March 3, 1883, ch. 133.

(6) *The collection of light money is not material.*

Upon the yacht's arrival at New York in July, 1891, the deputy collector imposed upon her a tonnage duty of 50 cents per ton "light money" (pp. 3, 65).

The imposition was made under Rev. St., § 4225:

> A duty of fifty cents per ton, to be denominated "light money," shall be levied and collected on all vessels not of the United States which may enter the ports of the United States. Such light money shall be levied and collected in the same manner and under the same regulations as the tonnage duties.

This imposition dates from 1804; but in 1805 the exception was made which now appears as Rev. St., § 4226:

> The preceding section shall not be deemed to operate upon unregistered vessels owned by citizens of the United States and carrying a sea letter or other regular document *issued from a custom-house of the United States* proving the vessel to be American property.

This yacht was indeed an unregistered vessel owned by a citizen of the United States. It did not, however, carry any document "issued from a custom-house." Its only document was issued by a United States consul. In this respect it differed from *The Miranda*, 1 U. S. App., 228. Nor was it a "vessel of the United States," technically speaking (Rev. St., § 4131).

Nor would the collection of light money by the deputy collector, even if mistaken, be an estoppel upon the United States. (See *Merritt* v. *Cameron*, 137 U. S., 542, 551–2; *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S.) If made illegally, Mr. Vanderbilt could protest and get back his money, or have the payment credited upon the present claim. It would certainly be an extraordinary ruling that a mistaken payment of $115 would protect him from a just claim for, say, $15,000.

(7) *The system of tonnage duties is immaterial to the present question.*

Tonnage duties are not levied upon the importation of a vessel; that is, upon its transfer, or arrival after transfer, from a foreign flag to that of the United States—its abandonment of foreign and assumption of American territoriality. They are levied upon the use of a vessel, in so far as its use involves entry into American ports. They are in effect a tax upon commerce, being in form imposed upon the entry of the vessel. When yachting from foreign ports first came into notice, American yachts were excused from entry (act of August 7, 1848, ch. 141; Rev. St., § 4214), which privilege was afterwards extended to yachts of foreign nations upon condition of reciprocity

(act of June 29, 1870, ch. 120, § 2; Rev. St., § 4216). Tonnage duties are analogous to taxes upon the business of a corporation as distinguished from its franchise. They are now imposed only for retaliatory purposes, and since 1886 have not properly belonged to the revenue system of the United States. (Act of June 19, 1886, ch. 421, §§ 11, 12.)

Tonnage taxes have always existed since the foundation of the Government; and it is argued that, taken in connection with the absence of any special provisions concerning dutiability of vessels, they show that vessels have always in the past been considered as exempt from the tariff. We shall now proceed to consider this historical argument.

(8) *The history of our tariff and navigation laws does not militate against the Government contention in this case.*

It was supposed by the learned district judge that our Government has always recognized the existence of a class of foreign-built American vessels entitled to its protection; that the arrival of such vessels in American ports has always been a familiar event; and that the absence of any record of tariff taxation upon such vessels therefore shows that they have always been regarded as subject to tonnage taxes alone.

We shall endeavor to show, on the other hand, that the presence of foreign-built and American-owned vessels has never, prior to modern yachting days, been familiar in our ports, except in certain cases which have no bearing upon the present controversy; that American

ownership of foreign-built vessels, while tolerated for the first 21 years of our constitutional history, was legally prohibited for the next 64 years, except in the cases just referred to; and that there are no historical arguments which have any strong bearing upon the case at bar.

It is necessary to trace the history of the term "sea letter," and of the so-called sea-letter or certificated vessels.

The sea letter was not a document of statutory origin like the register, enrolment, or license. It belonged to international law. It was for the purpose of identifying the nationality of a vessel, especially in time of war. It was also known as a passport, and a form will be found annexed to the French treaty of February 6, 1778. Sea letters or passports are also provided for in other treaties prior to 1789. They were known to Great Britain, and to every other civilized country also.

For a long time prior to 1789 Great Britain had been building up a system of navigation laws for the purpose of monopolizing commerce as far as possible, and also of securing it for British-built ships. The history of this legislation is given by Lord Eldon, C. J., in *Long* v. *Duff*, 2 B. & P., 209. The United States—not so much for protection to home industry, of which there was then no necessity in this instance, as for retaliation against Great Britain—adopted a similar system by the acts of September 1, 1789, ch. 11, December 31, 1792, ch. 1, and February 18, 1793, ch. 8. This legislation established a class of vessels known as "vessels of the United States,"

to which foreign-built craft were, as a rule, not admitted. (Rev. St., § 4131; act of 1789, § 1; act of 1792, § 1; act of 1793, § 1.)

There was no express prohibition, however, of American ownership of foreign-built ships; and upon the outbreak of the wars of the French Revolution such ownership became profitable, although they could not compete advantageously in home commerce on account of the discriminating tonnage duties. This was pointed out by Mr. Jefferson on May 3, 1793. (3 Whart. Int. Law Dig., p. 664.) Thereupon Mr. Hamilton, as Secretary of the Treasury, issued instructions to the collectors of customs directing "that all ships and vessels belonging to citizens of the United States shall be furnished, as soon as possible, with sea letters, for their more perfect identification and security." The instruction to the collector of New York is set forth in full at 2 Johns., pp. 534–5. They were signed in blank by the President, and countersigned by the Secretary of State, but filled up and further countersigned by the collector of customs. One of these sea letters is set forth in full at 2 Johns., 536–7.

These sea letters were not recognized by statute until the act of June 1, 1796, ch. 45, entitled "An act providing passports for the ships and vessels of the United States." This statute specially provided for such sea letters (under the name of passports) upon a form to be prepared by the Secretary of State and approved by the President; but it confined them to "ships and vessels of the United States;" that is, by adoption of the phrase defined in previous legislation, to registered vessels.

(See Rev. St., § 4306.) Speaking of this act a few years later, Clinton, Senator, said (*Sleght* v. *Hartshorne*, 2 Johns., 531, 546–7):

> And here two remarkable circumstances occurred; the term sea letter in the treaties was dropped in the statute, and the word pass-port adopted; and the pass-port was only authorized to be granted to registered vessels. This must have been considered as a negation of the right of the Executive heretofore exercised of granting passports to certificated vessels.

By "certificated vessels" the learned Senator referred to certificates which were then granted by usage at the custom-houses to show the American ownership of the cargo, and which seem to have been extended to cover the ownership of the vessel as well. The learned Senator says (pp. 545–6):

> It being proper and necessary that the owner should have some document to protect his property against the rapacity of cruisers on the ocean and to establish his neutrality, a formula has been devised, and is granted, called a certificate of ownership. * * * The owners of [unregistered] vessels, considering this certificate of ownership as a sufficient shield for neutral property, denominated it a sea letter, and it may have obtained that appellation at the time our first navigation act was passed, which was in the year 1789.

The act of 1796 would seem to have been intended to confine the right of protection to registered vessels; but it seems not to have been so construed in practice, and by the American owners of foreign-built vessels "this certificate was emphatically denominated a sea letter or protection" (p. 547). The word thus came, by the cus-

tom of merchants, to denote an entirely different class of papers to that to which it is properly applied, and the legal validity of this usage was the main question discussed in the Sleght case. (1 Johns., 192; 2 id., 531.)

The legality of these certificates and their customary name among merchants were first recognized by the act of April 14, 1802, ch. 26. Certain discriminations having been made against foreign ships by an act of May 13, 1800, it was provided that these discriminations—

> Shall not be deemed to operate upon unregistered ships or vessels owned by the citizens of the United States, *at the time of passing the said act*, in those cases where such ship or vessel *at that time* possessed *a sea letter or other regular document issued from a custom-house of the United States*, proving such ship or vessel to be American property.

It was further provided that the Secretary might grant certificates to vessels which were entitled thereto on May 13, 1800, which should then entitle them to equal privileges.

It would thus appear that the Congress of 1802 was opposed to the further recognition of foreign-built vessels as entitled to American protection, except so far as they were entitled to registry by our navigation laws; but that, in view of the practice which had prevailed, it was considered advisable to recognize all claims which had been made up to 1800. Construing the statute, Clinton, Senator, said (*Sleght* v. *Hartshorne*, 2 Johns., at p. 548):

> The term sea letter is used as synonymous with a regular document issued by a custom-house of the United States to certificated vessels.

Fuller recognition was given by Congress by an act supplementary to the act of June 1, 1796, above mentioned. (Act of Mar. 2, 1803, c. 16.) It was now provided that a passport similar to that provided by the act of 1796 should be given to—

> Every unregistered ship or vessel owned by a citizen or citizens of the United States, and sailing with a sea letter, going to any foreign country.

Here also the phrase "sea letter" is evidently used with reference to the custom-house document, and not to the document originally known by that name and described in Hamilton's instructions of 1793. Clinton, Senator, says (id., p. 547):

> This statute is one of the only two that contain the term sea letter, and that it is used here in the sense of a certificate of ownership can not be here doubted. A passport is to be granted to a vessel owned by a citizen sailing with a sea letter. The passport authorized by a former statute is precisely the same with the sea letter or passport of the treaties [etc.].

For a few years thereafter these certificated vessels remained unmolested. They were finally put an end to by the first Congress of Mr. Madison's administration. On June 20, 1809, Mr. Nathaniel Macon, of North Carolina (Annals of Congr., p. 349)—

> Observed that there was known to the laws of the United States a species of vessels called sea-letter vessels, foreign built, but belonging to this country. They appeared to be a mongrel species of vessel of which he wished to get rid.

He introduced a resolution of inquiry, which resulted, on January 19, 1810, in a bill for their abolition, reported by Mr. Newton (p. 1225). The debate over this bill lasted for two days, and was participated in by Josiah Quincy and many other prominent men of that Congress (pp. 1378–9). The debate is not reported at length, but the object of the measure is stated to be—

> To prevent these vessels considered by our revenue laws as foreign vessels from claiming the protection of the American flag on the sea, and thus favoring frauds by means of forged papers.

The bill was carefully considered and repeatedly amended in the two Houses, and finally resulted in the act of March 26, 1810, ch. 19, which prohibited the issuance of any "sea letter or other document certifying or proving any ship or vessel to be the property of a citizen or citizens of the United States," except to vessels duly registered or enrolled, or to vessels wholly owned by citizens "and furnished with or entitled to sea letters or other custom-house documents," or which, being then at sea, should return on or before June 30 next, or which should then be "detained abroad by the authority of any foreign power." The statute also contained the following explicit and sweeping provision:

> *Provided, nevertheless*, that no sea letter shall be issued to any vessel which shall not at this time be furnished or entitled to a sea letter, unless such vessel shall return to some port or place in the United States or territories thereof on or before the said thirtieth day of June next.

This statute was passed after the decision of the Sleght case, and seems to have been overlooked by the learned district judge in the case at bar. There can be no doubt that the "sea letter" referred to in the statute is the same "sea letter" which was referred to in the statutes of 1802 and 1803; and that the purpose and effect of the statute were to abolish from and after July 1, 1810, the custom-house usage of granting certificates of ownership to American vessels.

This in effect took away the protection of the American flag.

"In common with vessels of war the flag is the apparent sign of the nationality of the ship, but as a merchant vessel is not in the same close relation to the state as a public vessel, and its commander, unlike the commander of the latter, is not an agent of the state, recourse is not to be had to his affirmation in proof of its character, *which must be shown by papers* giving full information as to its identity and as to its right to carry the flag displayed by it, or, in other words, as to whether it has conformed to the laws of its state." (Hall's International Law, ed. 1895, p. 171.)

In order to appreciate the object and operation of the statute, it is necessary to bear in mind a doctrine of marine insurance law which was then familiar as well as thoroughly settled. The French Revolutionary and Napoleonic wars had been for many years in progress, and the principal risk insured against then was that of capture. Questions continually arose as to the regularity of a vessel's documents when she was seized by one of

the belligerent powers. If the policy contained a warranty that she was documented, a failure in this respect nullified the policy, whether or not she was actually captured. If the vessel was captured and forfeited by reason of a negligent omission to document her, then the underwriters were discharged from liability, irrespective of any representation or warranty. A vessel that could not be insured involved too great a risk for practical purposes. To take away its documents was substantially to throw the vessel out of business. Consequently, when Congress enacted that no unregistered and unenrolled vessels should in future be documented, it had a right to assume that the further growth of the class of "undocumented vessels" was effectually stopped, as seems to have been recognized by Kent, C. J., in the following year in *Barker* v. *Phœnix Ins. Co.*, 8 Johns., 307, 329, where he says:

> *At the time the policy was underwritten* there were two kinds of American vessels, the one registered and the other unregistered and carrying a sea letter or an official certificate of ownership, and both kinds were recognized by law as American vessels, though the former was entitled to higher privileges under the laws of Congress.

The principle that a warranty of American ownership is not complied with if the vessel has no passport, as required by treaty, was settled in England in 1798 in *Rich* v. *Parker*, 7 T. R., 705, a case which was followed by the American courts. (*Blagge* v. *New York Ins. Co.*, 1 Caines, 549; *Sleght* v. *Rhinelander*, 1 Johns., 192; *Parker* v. *Phœnix Ins. Co.*, 8 Johns., 307; *Coolidge* v. *New York Firemen Ins. Co.*, 14 Johns., 308; *Griffith* v. *Insurance Co. of North America*, 5 Binney, 464.)

The principle that no recovery could be had upon a policy of marine insurance when a vessel was seized and condemned for the negligent lack of documents required by treaty, although there might be no warranty or representation in the policy, was finally settled in England in *Bell* v. *Carstairs*, 14 East., 374, decided by Lord Ellenborough in 1811; and a similar decision was independently made by the supreme court of Massachusetts in the same year. (*Cleveland* v. *Union Ins. Co.*, 8 Mass., 308.)

Hence in *Le Cheminant* v. *Pearson*, 4 Taunton, 367, 379, Chief Justice Mansfield said, in 1812, in a marine insurance case: "I think that a ship must be properly documented, otherwise she will never be safe." Lord Alvanley, C. J., in *Baring* v. *Clagett*, 3 B. & P., 201, 213–14, discussed the American legislation, and expressed some doubt as to whether the French were obliged to respect any unregistered American vessels; but this *dictum* was disapproved by Chief Justice Kent in the Barker case, *supra*.

From 1810 to 1874 foreign-built American vessels, with certain statutory exceptions, were entitled to no documentary protection, and therefore were unable to obtain insurance against war risks, at least under the old form of policy. This was always recognized by the courts and for nearly half a century seems to have been recognized by the Executive Departments as well. The existence of a register would indeed be presumed by the courts upon proof of American ownership and management and clearance from an American port (*United States*

v. *Peterson*, 1 Woodb. & M., 305, 313), but a ship not properly documented under the navigation acts was held not to be an "American vessel" for the purposes of the crimes act. (*United States* v. *Rogers*, 3 Sumn., 342.)

In *White's Bank* v. *Smith*, 7 Wall., 646, 656, Mr. Justice Nelson says that vessels not registered or enrolled "are of no more value as American vessels than the wood and iron out of which they are constructed." The very "purpose of a register is to declare the nationality of a vessel." (*The Mohawk*, 3 Wall., 566, 571.)

In *The Merritt*, 17 Wall., 582, 586, Mr. Justice Hunt said:

> The documents of a vessel furnish the only evidence of her nationality.

In *Badger* v. *Gutierez*, 111 U. S., 734, 736–7, Mr. Justice Miller, apparently overlooking the repeal by the Revised Statutes of the proviso of 1810, said:

> It is to be understood that every vessel of the United States which is afloat is bound to have with her, from the officers of her home port, either a register or an enrolment. The former is used when she is engaged in a foreign voyage or trade, and the latter when she is engaged in domestic commerce, usually called the coasting trade. If found afloat, whether by steam or sail, without one or the other of these, and without the right one with reference to the trade she is engaged in, or the place where she is found, she is entitled to no protection under the laws of the United States, and is liable to seizure for such violation of the law, and in a foreign jurisdiction or on the high seas can claim no right to her rights as an American vessel.

The Revised Statutes, in § 4190, reenacted a part of the act of 1810, but omitted the proviso. This operated as a repeal of the whole act, by virtue of § 5596—

> All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be in force in lieu thereof.

It would seem, indeed, that Congress in omitting the proviso, acted upon a mistaken understanding of the state of legislation on and prior to December 1, 1873, for the clause next following in § 5596 is as follows:

> All parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature.

The first clause is, however, positive and unconditional. If the omission of the proviso was due to legislative misapprehension, it is a misapprehension which apparently can not be judicially corrected to the extent of declaring the proviso unrepealed; although the mistake would not affect the decision of a controversy which arose prior to the enactment of the Revised Statutes. (*United States* v. *Claflin*, 97 U. S., 546.)

The repeal of the proviso seems to have attracted no notice at the time, and it was, as above stated, overlooked by Mr. Justice Miller ten years later.

The purpose of the express prohibition in the statute of 1810 seems to have been forgotten in the course of half a century, and the old practice of granting certificates of ownership to unregistered foreign-built vessels

to have been recommenced. Upon the outbreak of the Crimean war the Secretary of State asked the opinion of Attorney General Cushing upon various questions concerning the purchase of ships of belligerents by neutrals. (6 Op., 638.) The Attorney General reached the conclusion that foreign-built vessels could be lawfully owned by Americans (p. 651), and that "the ship so purchased becomes entitled to bear the flag and receive the protection of the United States" (p. 652). The Attorney General proceeds as follows (pp. 652–3):

> At one period it was customary for the Government of the United States to issue sea letters and certificates of ownership to vessels owned by citizens of this country, whether the ship were or were not entitled to registry and enrolment. * * * The further issue of *those particular documents* after the 30th of June, 1810, seems to be prohibited by the act of March 26, 1810, so far as regards vessels not entitled to registry and enrolment. * * * The question of *what particular documents, if any*, shall be issued from the Treasury or the State Department to a foreign-built ship, lawfully owned by a citizen of the United States, in the absence of any special legislation on the subject, seems to me a proper one for the consideration of the Executive and of Congress.

The Attorney General thus makes the statutory prohibition practically a dead letter, by applying it only to documents under certain particular names, and overlooking its original intent; and, by leaving it open to the Treasury and State Departments to devise new forms of certificates to accomplish the same end, defeats the purpose of the original act.

No steps seem at first to have been taken in the premises. The consular regulations issued in 1855 have no reference to the subject. In 1856, however, after the reorganization of the diplomatic and consular service (Act of August 18, 1856, ch. 127), a new edition of consular regulations was promulgated by the President. Among these are incorporated certain regulations of the Treasury Department. These regulations state that foreign-built vessels, when owned by citizens of the United States, are entitled to the protection of the authorities employed by the United States, although "undocumented;" and that "a consular officer, though forbidden by law to grant any marine document or certificate of ownership, may lawfully make record of the bill of sale in his office, or authenticate its validity in form and substance and deliver to the owner a certificate to that effect, certifying also that the owner is a citizen of the United States." (§§ 635, 636.) It will be perceived that while the recital is correct, the authority given was unlawful. The certificate which the President authorizes is in practical effect nothing but a certificate of ownership issued in defiance of the act of 1810. It was therefore inoperative. (Compare *Morrill* v. *Jones*, 106 U. S., 466, 467.) It became lawful in 1874; but the recital still remains incorporated among the regulations of February 3, 1888, quoted in appellee's brief (p. 26).

While President Pierce thus endorsed the action of his Cabinet officers in disregarding the act of 1810, its binding force had been fully recognized by prior states-

men. Thus President Fillmore, in his annual message of 1851, said (3 Whart. Int. Law Dig., p. 141):

> The principle which this Government has heretofore solemnly announced it still adheres to, and will maintain under all circumstances and at all hazards. That principle is, that in every *regularly documented* merchant vessel the crew who navigate it and those on board of it will find their protection in the flag which is over them.

Daniel Webster, in his dispatch to Everett, of March 28, 1843, said (id., p. 139):

> The Government of the United States fully admits that its flag can give no immunity to pirates nor to any other than *regularly documented* American vessels.

Mr. Buchanan, as Secretary of State, in 1849, said (id., p. 665):

> There is no authority in law warranting an American minister in China "to grant sea letters or any documents of a like character to foreign vessels purchased by Americans residing in China, designed to be used in the coasting trade of that country."

The doubtful legality of President Pierce's regulations did not escape notice. On July 15, 1870, which was the day fixed for the final adjournment of Congress, and was also the day on which France declared war against Prussia, President Grant sent a special message to the Senate and House of Representatives, suggesting a postponement of the adjournment for the purpose of passing an act permitting the purchase of foreign-built vessels and their admission to American registry. (Congr. Globe,

p. 5625.) Such a bill had been introduced and debated in the Senate on the previous day, but it met with opposition, and while warmly pressed in both Houses of Congress was cut off by their adjournment.

The Postmaster-General thereupon asked the advice of the Department of Justice upon certain questions, which became the subject of an unpublished opinion of August 31, 1870, by Acting Attorney General Talbot.

The Postmaster General's first question, whether a citizen of the United States is "entitled to the protection of this Government" for a foreign-built, unregistered, and unenrolled vessel, was answered in the affirmative. The next two questions, as to the power of the President, Secretary of the Treasury, or customs officers to issue any documentary evidence of the American ownership of the vessel, were answered in the negative, and Mr. Talbot adds the following remarks:

> Thus far I have supposed that the special certificate or national protection in question must of necessity certify the fact of ownership by American citizens.
>
> If, however, your inquiry intends merely a certificate that a certain vessel is *totidem verbis* entitled to the national protection of the Government of the United States, then it may be that such a certificate is not in terms forbidden by the act of 1810; but it is also true that it is not authorized by any law, and that it is forbidden by the intendment of several statutes, and certifying as it would a conclusion of law, rather than a fact, it would probably not be recognized as having international authority.

After answering other questions immaterial here, Mr. Talbot closes with the following remarks as to the right of such vessels to bear the American flag:

> Vessels not thus known to the custom-house of the United States nor of any other nation, vessels such as mentioned in your first question, I need scarcely add, are nondescript and unknown in the law. If they leave the ports of the United States bearing the United States flag, they will have on board no papers provided according to law which would at any moment prevent them from hoisting the flag of another nation. Not even the authenticated document suggested by Attorney General Cushing, witnessing at most merely American ownership, would, in any event constitute such a paper; and this circumstance has led me to refrain from expressing concurrence with Mr. Cushing's opinion that such vessels are "entitled to bear the flag of the United States." While it might be true in a certain sense, yet I hesitate to assent to it as a truth having practical force. I doubt the propriety of declaring a vessel entitled to bear the flag of a nation when she can have on board no document known to national law as witnessing that title; and I apprehend belligerent cruisers upon the sea, and prize courts upon the shore, would give effect to this doubt. No veteran shipmaster would, I apprehend, deem it in conformity with the instructions of his experience, and no able seaman even would consider it good seamanship, to attempt to sail a vessel out of a port of the United States, least of all on a transatlantic voyage into the narrow seas of Europe, while a war was raging by sea and land between two great European powers, without having on board the proper "ship's papers" from the custom-house.

> Beyond this, as I examine this subject, it becomes to my mind more apparent that the privilege of bearing the flag of the United States (though without direct limitation of statute) does not properly belong to American property of every species merely as such, but only to that peculiar species of American property for which the acts of Congress have provided a special method of certifying its national character; in other words, that species of property which American laws know "as ships or vessels of the United States."
>
> If in the first twenty years after the adoption of the Constitution a looser practice existed, vessels not registered being furnished by executive officers, or by the President with sea letters, which in actual usage at that time served as certificates of national protection, that practice was brought to an end by the legislation of 1810, in the first year of Mr. Madison's administration; and I find no evidence of its recommencement under any of the fifteen Presidents in office since that time.

Similar questions were put to the Department of Justice by Secretary Fish on November 20, 1871. They were referred by the Attorney General to Mr. Charles C. Beaman, jr., then holding the office of Examiner of Claims. His opinion, dated January 5, 1872, was approved by Attorney General Akerman, and is printed in full in 3 Whart. Int. Law Dig., at pp. 679–687. It is very interesting, but for some unaccountable reason omits all reference to the statute of 1810, as to whose history and purpose its signers seem to have been uninformed. They consequently conclude that a foreign-built vessel, if owned by an American citizen, could "sail the ocean, flying the flag of the United States, entitled to

demand protection from the Navy and the consuls of the United States, but yet without any official papers on board from officers of the United States which would present *prima facie* and official evidence that she was entitled to carry that flag and to receive that protection" (p. 685).

Messrs. Beaman and Akerman do, however, point out one reason why, after the close of the Napoleonic wars, the question for so long a time ceased to excite interest. Speaking of the navigation laws of the last century, they say (p. 686):

> This legislation was doubtless intended to prevent, and did practically prevent, citizens of the United States from owning vessels not built in the United States; but it so prevented them, not by express enactment to that effect, but from the fact that in such vessels United States citizens could not in consequence of that act carry on any commerce with the United States, and no other commerce was open to them.
>
> To-day, however, the situation has changed, though the United States law remains the same.
>
> England opens her ports to the vessels of all nations, but of greater importance than this, China and Japan and other nations present a new field for commerce.
>
> Meanwhile the expense of building vessels in the United States has greatly increased. It is now possible, practicable, and profitable for citizens of the United States to carry on commerce, particularly in the Pacific Ocean, in vessels owned by them, but which vessels have no need to come to bring freight to or export it from the ports of the United States.
>
> Under these circumstances the laws of the United States cease to be effective to prevent citizens of the

> United States from owning vessels which are built out of the United States and are not registered in the United States, and it does not seem to me strange, then, to find that the laws of the United States have not as yet fixed any duties upon the owners of these vessels, *which never come to the United States* and so never have need of an American register to give them the privileges of the domestic and export commerce of the United States. If such vessels should come to the United States they must bear all the burdens placed upon foreign vessels, and knowing this they remain engaged in foreign commerce, entitled to the protection of the United States, but under no special relations to the consuls of the United States.

The matter was referred by Secretary Fish to Mr. Boutwell, the Secretary of the Treasury, who recommended legislation to define "the duties and liabilities as well as the privileges and immunities" of such foreign-built vessels. (42d Cong., 2d sess., Ex. Doc. No. 194, March 13, 1872.) No legislation ensued, however, except the repeal by the Revised Statutes of the prohibition of 1810.

In the special message of January 5, 1874, with relation to the case of the *Virginius*, President Grant spoke of the right to fly the American flag and to claim its protection "as enjoyed by all *regularly documented* vessels registered as part of our commercial marine." (3 Whart. Int. Law Dig., p. 149.) Secretary Evarts's dispatch of December 26, 1879 (id., pp. 669–72), was subsequent to the revision; as were the opinions of Attorneys General Devens, Brewster, and Garland, which have sometimes been referred to.

In closing this historical discussion it is to be remarked that since 1817 no foreign-built vessel of American ownership, except in one of the special cases above discussed, has been permitted to import goods into the United States. (Act of March 1, 1817, ch. 31; Rev. St., § 2497.) If she was found doing so, she was forfeited and sold. (*The Merritt*, 17 Wall., 582.) Consequently foreign-built unregistered vessels of American ownership, when used for commercial purposes, have since 1817 been employed in trade between foreign countries and remained strangers to American custom-houses, so that no departmental construction of the customs laws could arise with reference to them. Foreign-built and undocumented merchant vessels came to official notice only when they claimed protection in times of war between foreign nations, as in 1856 and 1870.

For these reasons no practice of levying duties upon undocumented American vessels could have existed. It remains to consider the cases of foreign-built vessels which have been admitted to American registry since the introduction of the present tariff phraseology in 1816. These cases have been comparatively few.

No inferences can be drawn from the free entry of vessels which have procured American registry by special act of Congress. The learned counsel for appellant says: "No inference as to the meaning of general laws can be drawn from the language used in special acts." If this be so, then no inference can be drawn from the departmental construction of the same special acts. Customs officers were certainly justified in assuming that

Congress had put into the statute all the conditions whose imposition it intended should be made. This disposes of a series of acts commencing in 1861 granting registry to vessels not belonging to the classes below mentioned. In one of these acts, as already pointed out, duties were expressly required, and they were accordingly exacted by the Treasury Department. (*The Geneva*, Syn. Dec., 8975.) Another required the payment of internal-revenue taxes upon the materials and construction. (Act of July 20, 1868, c. 180.)

Foreign vessels wrecked upon our coast are not imports because their arrival is involuntary. (*The Gertrude*, 3 Story, 68; *Merritt* v. *One Package of Merchandise*, 30 Fed. Rep., 195, 197.) By a series of special statutes in various instances, American citizens were permitted to raise and repair them, and to obtain American registry for them upon proof that the repairs amounted to three-fourths of the cost of the vessel when so repaired. For the reasons above stated, the customs officers were justified in not attempting to impose duties on the balance of the cost of the vessel, although it might have been actually landed on the coast; nor, under the peculiar circumstances of these cases, can any general inferences be drawn from their continued inaction after a general act was substituted for the special statutes. (Act of December 23, 1852, c. 4, Rev. St., § 4136.)

The case of vessels forfeited for violation of our laws and sold by the Government needs no comment. The Government does not transfer money from one pocket to another by levying duties on moneys in its own Treasury.

This leaves for consideration only the case of vessels sold as prize. (Act of December 31, 1792, c. 1, § 1; Rev. St., § 4132.) Special legislation was enacted during the war of 1812 as to the dutiability of prize cargoes (*Prince* v. *United States*, 2 Gall., 204); and, had privateering cut any important figure in our history since 1816, it might have been necessary to explain why the dutiability of prize vessels had not come up for adjudication. But privateering against citizens of a friendly state has always been unlawful, and even a criminal offense (acts of March 3, 1817, c. 58, and April 20, 1818, c. 88; Rev. St., § 5283); and we have had no war against any foreign power save the non-commercial Republic of Mexico. There is only one prize case from that war to be found in the reports of this court, and that was a capture of an American vessel by a Government cruiser. (*Jecker* v. *Montgomery*, 13 How., 498; 18 How., 110.)

Hence no support for the doctrine of practical construction can be found among registered "vessels of the United States."

This historical *résumé* disposes of the supposed historical arguments against the dutiability of foreign-built vessels when obtaining an American register or certification. Prior to 1810 we are not informed whether any attempt was made to levy duties, but probably there was not, since the tariff laws of that period were inapplicable. From 1810 to 1874 the acquisition of foreign-built vessels was prohibited, except in certain cases to which the tariff law would very naturally have been regarded by customs officers as inapplicable. Since 1874, while foreign-built

but American-owned vessels have remained a rarity, their dutiability has been expressly recognized by statute, and occasionally enforced by the Treasury Department.

It is respectfully submitted that no such definite and uniform departmental construction can be found as should prevent a decision of the question upon its true merits when raised at last upon the entry of this foreign-built yacht.

III.

The seizure of the yacht by the collector was a proper step toward collecting duties.

It has already been shown that the purpose of the McKinley tariff act was to include every article that should in the future be imported, whether or not its importation was within the present contemplation of Congress; that the language was well selected for this purpose and sufficiently broad to cover a ship; that similar language in the previous tariffs of 1874 and 1883 had actually been applied by levying duties upon certain small vessels; that there is no distinction in principle between those small vessels and this comparatively large one; and that the dutiability of vessels is recognized by a statute that has been in force for over twenty years.

What was the proper course for the collector to pursue in order to collect the duties?

An ocean-going yacht is one of those articles which, while covered by the tariff acts, are too bulky to admit of literal administration of the acts concerning the collection of duties.

A steam launch, to be used for pleasure only in American waters, may be brought over in winter on the deck of an American steamer and kept in a public warehouse until the icebergs disappear in the spring. There is no difficulty in this case.

A larger steamer, however, intended for use in strictly internal commerce, say upon one of the inland lakes of New York State, may come over from Europe or Canada upon her own keel for passage through the Erie Canal. She is too large to be put ashore and stored, and the warehousing act is inapplicable, unless she can be regarded as herself a warehouse within *Hartranft* v. *Oliver*, 125 U. S., 525, and *Scheeyer* v. *Scheeyer*, 153 U. S., 609, 612–3. Nevertheless, her use is lawful, although foreign built, as she is not within the ken of Congress (*Geer* v. *Connecticut*, 161 U. S., 519, 531, and cas. cit.); yet she is undoubtedly an import, and the law expressly contemplates that she shall be subject to "the payment of *all customs* and other fees under any act of Congress" (act of April 18, 1874, ch. 110).

There is great difference in size, but no difference in principle, between the launch and the small steamer for lake navigation; between the small steamer and the ocean-going yacht *Conqueror;* between the yacht and a Cunarder. One being dutiable, all are dutiable. Hence, if the customs administrative legislation provides fully for the launch and does not provide sufficiently for the lake steamer or the ocean-going yacht, the omission in the latter instances must be supplied by analogy, by the very general supervisory power of the Secretary of the Treasury or from the common law of revenue collection.

All of the customs administrative legislation relates to "merchandise," a word, as above shown (II, 1, *supra*), of varying signification. The legislation is, however, not applicable to the case of a large vessel without considerable latitude of construction. The remedy provided, in case of failure to make entry, is for the collector to take possession and deposit in stores, under lock (Rev. St., §§ 2963, 2964):

> § 2963. When merchandise, imported into the United States, has not been entered in pursuance of the provisions of any act regulating imports and tonnage, the same shall be deposited in the public warehouse, and shall there remain, at the expense and risk of the owner, until such invoice is produced. Nothing herein contained shall be understood to prohibit the sale of such quantities of merchandise so stored as may be necessary to discharge the duties thereon, and all intervening charges, at the time or times when such duties shall become due and payable.
>
> § 2964. In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, or whenever the owner, importer, or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, *the merchandise shall be taken possession of by the collector*, and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port, and the importer, owner, or consignee, such stores to be secured under the joint locks of the inspector and importer, there to be kept, with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times

> to their order, upon payment of the proper duties and expenses to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety to the satisfaction of the collector, in double the amount of the duties, and in such form as the Secretary of the Treasury shall prescribe.

The specific directions contained in the statutes concerning bonded warehouses contemplate warehouses on land. The Secretary of the Treasury, however, has a general power to "establish such rules and regulations not inconsistent with law for the due execution of" the warehousing act "as he may deem to be expedient and necessary" (act of March 28, 1854, c. 30, § 9; Rev. Stat., § 2989). He has also general power to "direct the superintendence of the collection of the duties on imports and tonnage as he shall judge best" (act of May 8, 1792, c. 37, § 6; Rev. Stat., § 249). Under these provisions he has never hesitated to declare a vessel to be "considered the warehouse" or "constructively designated as a warehouse" whenever advisable (Customs Regulations, 1857, p. 253; id., 1874, p. 296; id., 1892, p. 264). Vessels have been so treated by this court in cases above cited.

The Secretary thus, by his general powers, is able to supplement defects in the customs collection laws whenever they are discovered, although, of course, he can do nothing in conflict with them.

In the case at bar the collector was instructed merely to take the necessary steps for the appraisement of the vessel, and the assessment and collection of duty thereon.

He correctly regarded the sections above cited as applicable to the case, merely omitting the deposit in store as an impossibility, and holding the vessel as constructively in warehouse (pp. 59, 86). Possession of the vessel is sufficient for customs purposes. Its deposit in a store under key is no more necessary than practicable. *Lex neminem cogit ad vana seu impossibilia.* The collector's duty was to hold it one year at the owner's risk (§§ 2969, 2973).

All requirements of the customs laws are not mandatory. Many of them are merely directory or advisory, as is so often the case where requisitions prescribed for official conduct are not "intended for the protection of the citizen and to prevent a sacrifice of his property." (*French* v. *Edwards*, 13 Wall., 506, 511; Endlich on Interpretation of Statutes, § 437; *Erhardt* v. *Schroeder*, 155 U. S., 124.) The provision for depositing merchandise in the public stores in § 2964 (being the portion following the words above italicized) has always been regarded as directory by the Treasury Department. The special regulations concerning vessels as constructive warehouses have been referred to. There are many other instances in which the statutory provisions are not practically sufficient, and necessity requires that the importer be allowed the privilege of a warehouse entry without actual deposit of his goods in a bonded warehouse. The law expressly provides for some of these cases (§ 2958); but the special provision in these instances has never been regarded as cutting off the power of the Treasury Department to allow warehousing privileges in cases not foreseen by the legislators. The section just cited pro-

vides for storage of coal and lumber, but the Department extends the privilege so as to include "marble, molasses, sugar in hogsheads and tierces, railroad, pig, and bar iron, anchors, chain cables, and other heavy, bulky articles;" also "imported horses, cattle, sheep," etc. (Customs Regulations, 1892, Art. 671; Syn. Dec. 4314.)

By a similar extension of the provisions of this section, the Department could improvise a shipyard or dock for the storage of an imported yacht or other vessel, just as it can provide a yard on *terra firma* for the storage of a menagerie. In the present case the collector considered it sufficient to put an officer on board the yacht and regard it as constituting a warehouse in itself, sufficiently to satisfy the requirements of the revenue laws.

Similar extensions of the warehouse system to meet unforeseen contingencies occasionally occur. Thus on at least two occasions heavy steel shafts for steamers have been imported. It was impracticable to take them to warehouse, and they were allowed to remain upon the wharf. A similar ruling was made in the case of a cargo of rails. It will be remembered that a large raft of logs was towed down from the British provinces some years ago, and entered at the custom-house in New York. This raft could not have been warehoused in any manner; but if not duly entered, the collector could, without question, have taken possession of it and treated it as constructively in warehouse.

Our tariff administration law, in its specific provisions, is quite imperfect with respect to articles imported otherwise than as cargoes of vessels. It is all based upon

the famous Revenue Collection Act of March 2, 1799, ch. 22. Importations other than by water were then practically unknown. Upon our southern frontier, adjoining the Spanish provinces of Louisiana and Florida, and also on the northeastern boundary, between the district of Maine and the British provinces, they were expressly prohibited. After providing for the collection districts in the several States, the act of 1799 provided for six districts "in the territory of the United States northwest of the river Ohio." The western and southwestern frontier districts were those of Michilimakinac, including "the island of that name, the adjoining lands ceded to the United States by the Indian nations at the treaty of Greenville, and all the waters, shores, and inlets to the westward and northward of the lakes Michigan and Superior, and the rivers, waters, shores, and lakes connected therewith, lying within the jurisdiction of the United States, unto the northern and northwestern boundaries thereof;" the district of Illinois including, with other territory, "all the waters, shores, and inlets of the river Mississippi above the mouth of the river Ohio;" and the "district on the river Mississippi south of the State of Tennessee, which shall include all the waters, shores, and inlets of the river Mississippi, and other navigable rivers and waters connected therewith, lying within the jurisdiction of the United States and south of the said State" (§ 17). At that time the jurisdiction of the United States to the northwest of the Mississippi River was within the watershed of that river.

The act further provided that "except into the districts hereinbefore described on the northern, northwestern, and

western boundaries of the United States, adjoining to the dominions of Great Britain, in Upper and Lower Canada, and the districts on the rivers Ohio and Mississippi," no foreign dutiable goods, wares, and merchandise should be imported otherwise than by sea, in vessels of at least 30 tons burden (§ 92). This, as above pointed out, excluded the southern and northeastern boundaries. Importations were permitted "into the districts which are or may be established on the northern and northwestern boundaries of the United States and on the rivers Ohio and Mississippi in vessels or boats of any burthen, and in rafts or carriages of any kind or nature whatsoever." Importations by other methods are not expressly prohibited (§ 105).

Upon the acquisition of Louisiana this provision became applicable to the whole southwesterly boundary (Act of Feb. 24, 1804, c. 13, § 4); and the treaties of 1831 and 1848 extended the same privileges to Mexican commerce which had been enjoyed by that with Canada.

With these exceptions no further amendments seem to have been made to the restrictive provisions; and they were even so blindly treated by the revisers of 1874 that § 3095 of the Revised Statutes still contains the phrase "on the northern, northwestern, and western boundaries of the United States, adjoining to the Dominion of Canada," although there are now no such northwestern or western boundaries, while there is an eastern boundary adjoining that Dominion. The special permission as to importations "on the northern and northwestern boundaries" is still in terms restricted to "vessels or boats

of any burden," and "rafts or carriages of any kind or nature whatsoever" (§ 3096). Subsequent statutes of 1821 and 1864, applicable to importations from adjacent or contiguous foreign countries refer to importations in "any boat, canoe, or raft, * * * carriage, or sleigh," and to "vessels, cars, and other vehicles and envelopes * * * trunk, travelling bag, sack, valise, or other envelope" (§§ 3098, 3100); but no specific permission to import in all kinds of "envelopes" exists, while there is no prohibition of importation of articles which are not in "envelopes" at all, but on their own legs or keels.

There being no express prohibition, it has never been regarded as illegal to import by land otherwise than in a carriage, and, as above noticed, a raft of logs was even imported into the port of New York. It was impossible to comply with the provisions of § 3095 in the case of these logs, nor was that section regarded as prohibiting importations by sea otherwise than "in" a vessel; and for similar reasons the section was regarded by the Treasury Department, and, as we submit, rightly regarded, as inapplicable to the case of this yacht, which was therefore simply held for duty, and not for forfeiture.

But if our legislation concerning the administration of the customs laws were held to contain no clause applicable to the present case it would be left to the regulation of the Secretary of the Treasury under Rev. St., §249; or, in the last resort, it would be governed by the common law, and the collector's seizure would be justified, whether considered as a distress or as the taking possession of goods upon which the sovereign has a lien.

IV.

The certificate of probable cause protects the collector from any judgment for damages or costs.

This point was fully and ably discussed by Solicitor General Maxwell in his brief upon the application for the writ of *certiorari* in this case, and little can be added. The main line of his argument (to which we refer) is as follows:

The liability of a Government officer for wrongful seizure of property is in tort. He is sued personally, and his official character is no protection. The hard-ship is so great that statutes were passed at an early date, both in England and in this country, protecting him against such actions when there was probable cause for seizure. Under these statutes it is well settled that doubt as to the construction of the law, as well as doubt concerning questions of fact, constitutes probable cause. It may be added that the certificate of the trial judge is conclusive upon this question. (*The Apollon*, 9 Wheat., 362, 374.) The early legislation of this country, however, was found not to be sufficiently broad, and it became necessary to provide further for the complete protection of seizing officers. This was done by the act of February 24, 1807, ch. 19, § 1, which provided as follows:

> That when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise made by any collector or other officer, *under any act of Congress authorizing such seizure*, and judgment shall be given for the claimant or claimants, if it shall appear to the court

> before whom such prosecution shall be tried that there was a reasonable cause of seizure the said court shall cause a proper certificate or entry to be made thereof, and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure or the prosecutor be liable to action, suit, or judgment on account of such seizure and prosecution: *Provided*, That the ship or vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or claimants, his, her, or their agent or agents.

This act is substantially reenacted as Revised Statutes, § 979.

Its applicability to the present case is questioned on the ground of the peculiarly technical meaning of the words "seizure" and "claimant" in forfeiture proceedings. The collector in the present case did not seize the yacht for the purpose of instituting such proceedings. He seized it as a dutiable article not duly entered at the custom-house, with the intent not of libelling it for forfeiture but of holding it until due entry should be made, so that it could be appraised for the purpose of estimating *ad valorem* duties. Consequently, in the technical language of admiralty procedure, it is the collector and not the owner of the vessel who is "claimant."

It was argued by Mr. Maxwell, and is now again respectfully submitted, that so restrictive a construction of the statutory provision would fail to carry out its full intent and is not required by the rules of law concerning the interpretation of statutes. The taking possession of the yacht was in fact a seizure, and the owner of the yacht is in fact, although not in admiralty practice, the claimant.

In *United States* v. *Freeman*, 3 How., 556, 565, quoting from *Stowell* v. *Zouch*, Plowd., 366, Mr. Justice Wayne says:

> A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.

Mr. Justice Wayne proceeds as follows:

> These citations are but different illustrations of the rule that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being that to extend the meaning to any case not included in the words the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason.

In *Lau Ow Bew* v. *United States*, 144 U. S., 47, 59, the Chief Justice says:

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and if possible so as to avoid an unjust or an absurd conclusion.

A recent instance of this rule of construction is to be found in *Alberty* v. *United States*, 162 U. S., 499. A treaty provided that a certain Indian court should "retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation, by nativity or adoption, shall be the only parties." The murdered man was held to be "party" to a murder case within the meaning of this clause.

As already stated, the seizure is "under" an act when the seizing officer has "probable cause" to so construe the act as to justify his proceedings.

V.

No damages are recoverable from the collector upon the evidence in this case.

Assuming that the yacht was not a dutiable article, its seizure was a marine tort, but committed under the express orders of the Secretary of the Treasury, and not malicious, reckless, or wanton.

It is undisputed that this yacht was to be used for no purpose but that of pleasure. It is not anywhere claimed even that Mr. Vanderbilt intended to let the yacht to anyone else for hire, or that he intended to use her himself for any length of time. She had, indeed, put in some coal, and was about to start upon a trip; but, so far as appears from the testimony, the trip may have been but a short one, to be measured by a few weeks or even days. The yachting season was nearly over, and before many weeks the weather would be too rough and cold for enjoyment, except for a trip to some foreign clime. Yet under these circumstances demurrage was allowed at the rate of $100 per week for the whole period of detention by the various collectors, and for the whole subsequent period of detention by the United States marshal under the process in this suit, and the whole amount was charged against Mr. Fassett as if he had been the sole tort-feasor. The demurrage thus granted was made to extend far past the end of the yachting season, and even into the month of February following.

This decree is based upon the testimony of three yacht brokers (pp. 96–9). These gentlemen all testify that they have been in the business for periods varying from 13 to 19 years; have been familiar with buying, selling, and leasing steam yachts, and have examined the yacht in question. The figures given by them are exclusive of wages and other expenses of the trip, as they testify that the hirer of a yacht assumes these expenses. We set forth the entire testimony of these witnesses bearing upon the measure of damages, except as above stated.

Samuel Holmes, on direct examination, testified as follows (p. 97):

> Q. Please tell us what, in your opinion, was the fair and reasonable value of the use of that yacht "Conqueror," from August 27th, 1891, to February 3rd, 1892.
>
> A. I should set it down about $15,000.
>
> Q. How much per month?
>
> A. About $3,000.

Upon cross-examination, he testified as follows (p. 97):

> Q. Mr. Holmes, did you ever charter a vessel of this size and tonnage—a steam yacht?
>
> A. Yes, sir.
>
> Q. When?
>
> A. I chartered a boat this size about three or four years ago.
>
> Q. For about this amount, $3,000 or $4,000 a month?
>
> A. No, sir; it was a little less.
>
> Q. How much?
>
> A. It was for about $9,000.
>
> Q. For how long?

A. It was for a winter trip to the West Indies, Mexico. The circumstances were a little different than this, though.

Owain L. Hughes testified as follows, not being cross-examined upon this point (p. 98):

Q. You may state what, in your judgment, was the fair and reasonable value of the use of the "Conqueror" from August 27th to February 3rd, 1892.

A. $100 a day, sir.

Thomas Manning testified as follows, not being cross-examined at all (p. 99):

Q. Give us your judgment as to what the fair and reasonable value of the use of the "Conqueror" was from the 27th of August, 1891, to the 3rd of February, 1892.

A. About $20,000; that is for the boat itself, without the crew.

Q. And without any other expenses, such as food of crew, or wharfage, or sundry running expenses?

A. Nothing but the boat and its equipments.

Q. Do you figure at a rate per day for that time, or a round sum?

A. I am figuring for—that is the rate I could have gotten for it at that time, or about that time.

Q. You think you could have gotten $20,000?

A. I think I could have gotten a little more at that time—yes, I could have gotten more at that time.

Q. Was there a demand for such yachts?

A. There was *more or less demand* for those large boats, but a great difficulty in getting them—almost an impossibility.

It is respectfully submitted that the judgment for damages is wholly unsustainable, and for two reasons:

(1) *There can be no demurrage for the detention by a public officer of a yacht intended solely for its owner's use.*

It has, indeed, been held by Judge Lowell at circuit, in a collision case, that demurrage is allowable for detention of a yacht pending repairs. (*The Walter W. Pharo*, 1 Low., 437.) The amount of money involved in that case was small, and it does not appear to have been very fully argued. The decision has been followed by Judge Benedict (*The Legonda*, 44 Fed. Rep., 367), but it is submitted that it does not accord with the general current of authority upon analogous points, and at least that it is not applicable when the detention is the act of a public officer acting upon orders of his superior, and with probable cause.

In *Sprague* v. *West* (Abb. Adm., 548, 554) Judge Betts said:

> Demurrage is only an *extended freight* or reward to the vessel in compensation for the earnings she is improperly caused to lose.

The same definition is given by Judge Shepley in *Donaldson* v. *McDowell*. (1 Holmes, 290, 292.)

Speculative damages, as for loss of expected profits of the voyage, are not a proper measure of the demurrage. (*The Schooner Lively*, 1 Gall., 314, 324–7; *The Amiable Nancy*, 3 Wheat., 546, 560; *La Amistad de Rues*, 5 Wheat., 385.)

These cases are merely applications of the general rule of law that profits are allowable only where "not open to

the objection of uncertainty or of remoteness," or where, in contract cases, shown to have been "within the intent and mutual understanding of both parties." (*Howard* v. *Stillwell Mfg. Co.*, 139 U. S., 199, 206; *Cincinnati Gas Co.* v. *Western Siemens Co.*, 152 U. S., 200, 206.)

It will appear from the early cases above cited that the probable earnings of a voyage were not regarded as relevant in any way in fixing the amount to be recovered as demurrage, and accordingly Judge Betts and Mr. Justice Nelson held in a collision case (*The Rhode Island*, Abb. Adm., 100) that the measure of demurrage for detention pending repairs of the vessel injured must be interest at six per cent upon her value. Evidence as to the loss of profits was also held immaterial in *Smith* v. *Condry*, 1 How., 28, 35.

The cases above cited were to a certain extent overruled by *Williamson* v. *Barrett*, 13 How., 101, where it was held, three justices dissenting (see pp. 113, 114), that loss of profits could be taken into consideration when estimating demurrage; but the opinion of the court shows that no damage can be awarded for detention of the vessel when it does not appear that she would actually have earned freight if not detained. Mr. Justice Nelson says (p. 111) of the rule thus established:

> It looks to the capacity of the vessel to earn freight for the benefit of the owner and consequent loss sustained while deprived of her service; in other words, to the amount she would earn him on hire. * * * If there is no demand for the employment, and, of course, no hire to be obtained, no compensation for the detention during the repairs

> will be allowed, as no loss would be sustained. But if it can be shown that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost in consequence of the damage the amount which she might have thus earned.

This case was based upon the authority of *The Gazelle*, 2 W. Rob., 279, a decision by Dr. Lushington in the English High Court of Admiralty. That learned judge expounded the rule as follows in *The Clarence*, 3 id., 283, 286–7:

> Although upon general principle the party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered, yet in all cases he is bound to prove that he has actually sustained the loss he alleges, and he must also supply the means of ascertaining its amount. * * * The question which I have to determine is not the rate at which such a vessel as *The Clarence* might be hired, but how much the company have actually lost by her detention whilst under repair. * * * In order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss and reasonable proof of the amount. Both must be proved. * * * The objection, it appears to me, has been founded upon a misapprehension of the principle upon which the court proceeds in assessing the amount of damage. It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost or where

> the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff, and this *onus* has not been discharged upon the present occasion. Had the owners of *The Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted.

In *Sturgis* v. *Clough* (1 Wall., 269) demurrage was allowed by the commissioner in a collision case upon merely speculative evidence. The allowance was rejected by the district judge, and his action was affirmed by this court.

Upon the authority of the three cases last cited, Judge Longyear in *The Mayflower* (Brown Adm., 376, 385) held "that the loss of earnings during detention is clearly allowable, and this although not actually earning freight at the time of the injury, nor kept for hire, nor under a charter party, nor any market rental or charter value of vessels of like character, nor any demand for the hire of such vessels, provided it is proven to a reasonable certainty that the vessel would have been actually employed by the owner during such detention, and that she would actually have earned the owner something over and above her expenses." (See also *The Baltic*, 3 Ben., 195, 197; *The Transit*, 4 Ben., 138, 141; *The Rutland* [1896], P. D., 195, note.)

An interesting case is *The Emerald* [1896], P. D., 192, decided by the English court of appeal. The question involved in this case was whether demurrage could be allowed for detention pending repairs of a vessel used by a body of public trustees for the purpose of dredging

and raising wrecks in Liverpool Harbor. The court held unanimously that demurrage could not be allowed to the board of trustees because the vessel was not a source of profit to them. Lord Esher, M. R., said (p. 204):

> Then they talk of letting her go to Preston, and that the Preston people would have given £100 a week, probably. It is all imagination. * * * The dredger is not kept for the purpose of being let to anyone else. * * * To say that at some indefinite and future time they could have let her if they had not wanted her is too remote for anybody to act upon in giving them compensation for the loss of the dredger by way of damages. It seems to me that the damages were too shadowy and too remote to be the proper subject-matter of damages in the collision.

Lord Justice Smith said (p. 207):

> I agree with the report of the registrar and merchants upon this point. They say that "the Harbor or Conservancy Board are clearly not in the position of a trading company which is entitled to claim for loss of profit, and although their dredging operations were no doubt delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss."

Lord Justice Rigby said (pp. 208–9):

> The board attempted to show that in some circumstances they might let this dredger, but the evidence failed to fix any definite time when the board would no longer require to use her. It seems to me that the suggested damage which might be occasioned to the Mersey Docks and Harbor Board was mere speculation.

Demurrage thus represents a loss of earnings, not a mere deprivation of enjoyment; nor even a deprivation of the power to earn, if there was no intent to make use of the vessel, or if her probability of employment was merely speculative.

If this be the nature of demurrage in a negligence case, still more must it be so when the defendant is a public officer, acting under the orders of his superior and with probable cause.

(2) *There is no evidence sufficient to sustain a claim for demurrage in this instance.*

The case is somewhat like that of *Sturgis* v. *Clough*, 1 Wall., 269. In that case the vessel injured was engaged in towage about the harbor of New York. "Several witnesses were brought who testified that there was a great demand for labor at that time, and who gave their opinions as to what the vessel might have made per day if engaged." This was much like the testimony of the witness Manning in the case at bar. The court below said:

> A good deal of the testimony was general, and turned upon mere opinion as to the probability of employment in the towing business and the amount of the earnings if employed. This kind of proof is too speculative and contingent to be the foundation of any rule of damages; it is, at best, but conjecture. The true question within the case of *Williamson* v. *Barrett* was, what could the tug have been chartered for per day in the business of towing, regard being had to the market price in the city of New York.

Mr. Justice Grier, in delivering the opinion of this court, said:

> The charge for demurrage allowed by him [the commissioner] was not justified by the evidence, although there was testimony to support it, such as can always be obtained when friendly experts are called to give opinions.

The evidence in that case seems to have been less speculative than in the case at bar. Here, as there, no market price, properly speaking, is shown to have existed. Here, however, the only evidence tending to show "probability of employment," either by Mr. Vanderbilt himself or by anybody else if he was willing to make a lease of his yacht, is that of one witness who gives merely the bold assertion that he could have gotten more than the sum in question.

That there must be some evidence of a market demand in order to sustain a judgment for demurrage is held, as above shown, in *Williamson* v. *Barrett*, 13 How., 101, 111, and other cases above cited. In all cases of demurrage it is as necessary to show the existence of a demand as it is to show what would be the fair rental of the vessel if an efficient demand existed.

The rule is the same as in patent cases when damages are sought against an infringer. In *Rude* v. *Westcott*, 130 U. S., 152, 165, Mr. Justice Field said:

> Sales of licenses made at periods years apart will not establish any rule on the subject and determine the value of the patent. Like sales of ordinary goods, they must be common—that is, of frequent occurrence—to establish such a market price for the

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> Sales of licenses made at periods years apart will not establish any rule on the subject and determine the value of the patent. Like sales of ordinary goods, they must be common—that is, of frequent occurrence—to establish such a market price for the

> article that it may be assumed to express, with reference to all similar articles, their salable value at the place designated.

In order to make a finding of market value, there must be evidence that a market exists. It is submitted that such evidence is not to be found in a record which merely shows that "there is more or less demand for those large boats, but a great difficulty of getting them—almost an impossibility." To make a market value, there must be supply as well as demand; the goods must be "bought and sold in the ordinary course of trade." (*Moser* v. *Magone*, 155 U. S., 240, 249; see, also, *Harris* v. *Panama R. R. Co.*, 58 N. Y., 660; *Murray* v. *Stanton*, 99 Mass., 345, 348; *Atchison, &c., R. R. Co.* v. *Stanford*, 12 Kans., 354, 380; *Trout* v. *Kennedy*, 47 Pa. St., 387, 393; 1 Sedgwick on Damages, 8th ed., § 250.) When no market value exists the judgment for damages is based on actual earnings of the vessel. (*The Cayuga*, 2 Ben., 125, 126, aff. 14 Wall., 270, 278.)

The value of the enjoyment of a vessel at sea, when not measurable by market value or by the vessel's past earnings, is so vague and speculative that the general current of authority seems opposed to the existence of any such doctrine as that of the recovery of the value of the use of articles having a "usable value" in replevin cases; and, instead of awarding either the value of the use or interest on the value of the vessel, damages have been disallowed altogether. If it be assumed, however, that Judge Lowell's decision above cited is correct, and

that the same rule obtains here as in replevin cases at common law, it will be shown in our next and last point that the judgment is still erroneous and must be reversed.

This may be regarded as a hardship upon the yacht owner who has been deprived of his enjoyment by the detention of his vessel. Such hard-ships are common when the damages suffered are remote or speculative in character. It may, however, be seriously doubted whether Mr. Vanderbilt could not have avoided this hard-ship by proceeding at common law instead of in admiralty. Notwithstanding the fact that admiralty had jurisdiction, he was at liberty to pursue any common law remedies which he might have. (Rev. St., §§ 563 (8), 711 (3); Story on the Constitution, quoted in *Taylor* v. *Carryl*, 20 How., at p. 598.) If a yacht is not a dutiable article the collector was proceeding tortiously and without any protection of law. It is on this theory, indeed, that the damages are sought. It is claimed that there is no law which gives a color to his act. Notwithstanding, therefore, the intimations to the contrary in this case at 142 U. S., pp. 485, 486, it would seem that the vessel was repleviable, if this claim be correct. (*Wright* v. *Briggs*, 2 Hill, 77; *Slocum* v. *Mayberry*, 2 Wheat., 1.) Those intimations were not necessary to the decision of the court, since admiralty without doubt has concurrent jurisdiction.

VI.

The damages allowed were far too great, if any damages whatever are recoverable.

There are various objections to the large allowance made in this case.

(*1*) *The measure of damages, if any, should have been interest upon the value of the yacht, together with compensation for any deterioration.*

For the purposes of this discussion we assume, notwithstanding what has been above argued, that the damages recoverable are the same as in an action of replevin at common law. In such a case the damages for detention are presumptively but interest upon the value of the article detained, although there is an exception in special cases of "property which is in constant and daily use and the usable value of which is well known and readily ascertained." (*Redmond* v. *American Mfg. Co.*, 121 N. Y., 415, 419.) "The amount of recovery for the detention of property should ordinarily, where there is no deterioration, bear a reasonable proportion to the value of the same, otherwise the judment can not be sustained." (*Romberg* v. *Hughes*, 18 Neb., 579, 583.) The value of the use is to be measured by the "ordinary market price of the use of such property." (*Stanley* v. *Donoho*, 16 Lea, 492, 494.)

When, therefore, there is no market, properly speaking, and the property is not such that its usable value is well known or readily ascertained, the case is not brought within the exception to the general rule. Yachts of this size, as admitted by libellant's witness, are almost impossible to obtain for purposes of hire. There can, therefore, as already shown, be no market value for their use,

and opinions as to what their market value would be if there were any market are entirely speculative. Interest upon the value of the yacht, together with an allowance for depreciation, is presumptively equal to the value of its use. (*Bigelow* v. *Doolittle*, 36 Wis., 115.) A judgment based upon these two elements would conform to the rule in replevin. The present judgment is made "upon mere conjecture and speculation as to what the use of the property might have brought if it could have been rented out during the period of the detention at the figures given by the witnesses." (*Anchor Milling Co.* v. *Walsh*, 27 Mo. App., 97, 101.) Evidently these figures would be obtainable only under the most favorable circumstances. (See *Talcott* v. *Chippen*, 52 Mich., 633, 636.)

(2) *Mr. Fassett can not be made responsible for the acts of Mr. Hendricks.*

It will be remembered that Mr. Fassett relinquished possession of the yacht on October 1, 1891, when Mr. Hendricks succeeded him as collector. Damages can be recovered against him only upon the theory of a personal tort committed by him. Mr. Hendricks was in no sense his deputy, and in no sense represented him. This alone should be enough to strike out four-fifths of the recovery.

(3) *Neither Mr. Fassett nor Mr. Hendricks was responsible for the detention by the United States Marshal under the process in this proceeding.*

We are unable to find any precedent or even *dictum* in the books to sustain this charge.

In *Averill* v. *Smith*, 17 Wall., 82, 90–1, a similar claim for damages was denied for the following reasons, among others:

> (3) Because the property was taken out of the possession of the defendant by virtue of the judicial process issued by the district court, pursuant to the prayer contained in the information, and remained throughout the litigation in the custody of the marshal, as the officer of the court which issued the process. (4) Because the property under such circumstances, though in the custody of the marshal for safekeeping, is, in contemplation of law, in the possession of the court for adjudication.

For similar reasons demurrage was disallowed after service of process in *The Nuestra Señora de Regla*, 108 U. S., 92, 104, Chief Justice Waite saying:

> By the surrender of the vessel for adjudication, the United States relieved themselves from any further liability for damages in the way of demurrage, and became bound for the vessel instead.

The allowance for expenses while the vessel was held by the marshal is directly contrary to the Revised Statutes. § 829 provides an allowance to the marshal for the safekeeping of the vessel as follows:

> For the necessary expenses of keeping boats, vessels, or other property attached or libeled in admiralty, not exceeding $2.50 a day.

For the above reasons it is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Assistant Attorney General.

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OCT 28 1896
JAMES H. McKENNEY,

Supreme Court of the United States.

No. 98.

FREDERICK W. VANDERBILT,
Libellant and Appellee,

against

The Steam Yacht "Conqueror," Her Engines, &c., and
J. SLOAT FASSETT,
Appellant.

BRIEF FOR APPELLEE.

ELIHU ROOT,
S. B. CLARKE,
BRONSON WINTHROP,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.—1896.

Supreme Court of the United States.

OCTOBER TERM OF 1896.

NUMBER 98.

The Steam Yacht "CONQUEROR," her Tackle, &c., J. SLOAT FASSETT, Claimant-Appellant,

AGAINST

FREDERICK W. VANDERBILT, Appellee.

BRIEF FOR APPELLEE.

[NOTE.—At this writing, October 26th, 1896, we have not seen the appellant's brief and understand that none has been filed.

We are informed, however, that the case is likely to be reached on October 29th or 30th, and we therefore reprint our brief in the Court of Appeals with the addition of a preliminary objection. The Court of Appeals' brief deals with all the points relied upon by the appellant in the Court of Appeals as we understood them.]

The "Conqueror" is a foreign built steam yacht of two hundred and nineteen tons, net tonnage. On May 7th, 1891. she was purchased by the respondent, an American citizen, and after cruising for a time in the waters of Great Britain and Norway, she was navigated across the high seas to the United States, arriving at the port of New York on July 6th, 1891.

She was duly entered as a vessel with the Collector of the Port and paid the "light money" levied upon her as a vessel by the Collector pursuant to R. S., Section 4225.

On August 27th, 1891, the Collector, in obedience to instructions from the Treasury Department, founded upon an opinion of the Solicitor of the Treasury, that the yacht should be regarded as a dutiable importation (Record, p. 66), took forcible possession of her and held her thereafter until dispossessed by the Marshal under the authority of the District Court.

On September 1st, 1891, the respondent as owner of the yacht filed a libel in the District Court in a cause of possession in admiralty, against her and against Mr. Fassett, the Collector, alleging that the Collector's action was unwarranted by law and therefore tortious and praying for restoration and damages.

Process for the arrest of the yacht was issued, but the execution thereof was resisted by Mr. Fassett and it was not until *alias* and *pluries* process, accompanied by a specific Court order, had been issued that the Marshal succeeded in obtaining exclusive and undisputed control of the yacht.

Record, pp. 6 to 21.

Mr. Fassett then applied to this Court for a writ of prohibition which was denied.

In re Fassett, 142 U. S., 479; and see petition, rule and return in present Record, pp. 66 to 83.

The case was then tried in the District Court and resulted in a decree of restitution and damages.

Decree, Record, p. 120.
Judge BROWN's opinion, Record, pp. 86 to 94.

Mr. Fassett then appealed to the Circuit Court of Appeals which affirmed the decree without written opinion.

Record, pp. 127, 128.

The decree of affirmance accompanied by an order that the cause be remanded to the District Court with instructions to proceed therein according to law and that a mandate issue accordingly was entered June 6th, 1893. The mandate was issued in fact on June 7th, 1893.

Idem.

No action looking to a review of the case in this Court was taken during that term of the Court of Appeals, but nearly a year after the cause had been remanded to the District Court (on May 3d, 1894) the present writ was issued upon the assumption, as its recitals show, that the cause was still pending in the Court of Appeals.

Record, page 1.

NOTE: New term of the Court of Appeals began on the last Tuesday of October, 1893 ; 26 Stats., 826, Section 3 ; 1 U. S. App., 700, Rule 3.

To this writ the Clerk of the Court of Appeals has made a return negativing the recitals of the writ. The return contains the decree of affirmance with a copy of the minute of the issuance of a mandate remanding the cause as provided in the decree, and with a copy of the transcript of record which had been sent up from the District Court. It does not contain the mandate itself.

We submit, preliminarily, that the case is not properly before this Court :

FIRST. Because the mandate is not here. The statute (Act of 1891, Sect. 10, 26 Stats., 829) requires the District Court to act upon the mandate. It is the very thing to be affected by such decision as this Court may render, and ought therefore to be here.

SECOND. Because in legal contemplation the case is in the District Court and is not brought

here by a writ addressed to a Court which had lost all jurisdiction of it before the writ issued.

It is the "case" and not the judgment of the Court of Appeals which the statute authorizes this Court to review (Sec. 6, 26 Stats., 828). But by Section 10 of the Act the cause (*i. e.*, the "case") is directed to be remanded to the District Court; and the return shows that this has been done.

THIRD. Because both the exceptions contained in Section 6 of the act contemplate the acquisition of jurisdiction by this Court, *pending the jurisdiction of the Court of Appeals*. Surely, the finality of a judgment of the Court of Appeals would not be affected, if after entry and after the issuance of the mandate, and after the expiration of the term, that Court were to certify to this Court, under the first exception of Section 6, a question involved in the judgment; and for, the same reasons, must it not be held that this Court acquires jurisdiction under the second exception only if its writ issues before the jurisdiction of the Court of Appeals has expired? On any other view of the statute, what limit of time is there? Do the judgments of the Court of Appeals never become final? Are they for all time liable to be disturbed by this Court?

The word "final" in Section 6 is plainly used in two different senses, which ought to be discriminated.

When the section says that the Court of Appeals shall exercise appellate jurisdiction to review "final decision in the District Court and the existing Circuit Courts," the word is not used to explain or limit or state the scope of the jurisdiction of the District or Circuit Court or the effect of its decrees. It is used merely to limit the jurisdiction of the Court of Appeals to a consideration of the specified cases after the District or Circuit Court has passed upon and got through with them.

But when the section says that the "judgments or

decrees of the Circuit Courts of Appeals shall be final, * * * excepting," &c., the word "final" is used solely to define the effect of the judgments of the Courts of Appeals. It is not used at all to limit or state the jurisdiction of the Supreme Court. The sole meaning is that (with the two specified exceptions) the action of the Court of Appeals finally settles the rights of the litigants. This is shown plainly by the first exception. Under that exception "in every such subject within its appellate jurisdiction the Circuit Court of Appeals *at any time* may certify" questions to the Supreme Court, and thereupon the Supreme Court may require the whole case to be sent up to it for its consideration and decide the whole matter in controversy as if it had been brought there for review from the District or Circuit Court instead of to the Court of Appeals; so that, under this exception, it is possible for the Supreme Court to pass upon a case without any final or other decision whatever in the Court of Appeals.

In which of these two senses is the word "final" used in the second exception, "and excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require," &c.? Plainly the second. The word must have the same meaning here that it has in the part of the section to which reference is made. On the one hand there is no intention indicated to limit the jurisdiction of the Supreme Court to a consideration of decisions of the Court of Appeals, and on the other hand there is no grant of power to the Supreme Court save by way of exception to the grant to the Court of Appeals. No intention is manifested to make the exception broader than the grant, and therefore, while the Supreme Court is authorized to act at any time during the pendency of the case in the Court of Appeals whether there has been a decision there or not, it must act, if at all, while the Court of Appeals itself could act, *i. e.*, while the power of that

Court to fix the rights of the litigants under the general grant in Section 6 continues.

The definition of the power of the Supreme Court in cases arising under the second exception is substantially the same as in cases under the first exception. Under both exceptions the Supreme Court has the same power to dispose of cases properly brought before it as if they had been brought to that Court by writ of error or appeal. The words "writ of error" and "appeal" import a decision in an inferior tribunal, but the decision connoted in the first exception certainly is not a decision by the Court of Appeals. It is a decision by the District or Circuit Court. There is no reason for saying that the same words in the second exception have any different connotation. There must be, then, a decision by the Circuit or District Court before the Supreme Court can act, but there need not be one by the Court of Appeals. It follows that if the duration of the power of the Supreme Court is limited at all the time must begin to run from the entry of decision in the District or Circuit Court and not from the entry of decision in the Court of Appeals. We must say either (1) that the power of the Supreme Court is unlimited in time; or (2) that the time is the same as that prescribed for writs of error or appeals from the District or Circuit Courts, and begins to run from the entry of judgment in those Courts; or (3) that the power of the Supreme Court is coterminous with that of the Court of Appeals. If either the second or third of these alternatives is the true one, the decision of the Court of Appeals in this case is final, and the Supreme Court is powerless to disturb it.

We think those parts of Section 6 which we are now considering have the same meaning which they would have had if expressed as follows:

> "The Courts of Appeals shall have final appellate jurisdiction upon writ of error or appeal from

> the Circuit or District Courts in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States, and in all cases arising under the patent laws, under the revenue laws, under the criminal laws and in admiralty cases, excepting that the Supreme Court may require any such case to be certified to it with power to dispose of the same as if it had been brought there by writ of error or appeal instead of to the Court of Appeals."

If such had been the provision would this Court have claimed an unlimited power over the judgments of the Court of Appeals? Would not this Court have held (1) that it could not act until the jurisdiction of the Court of Appeals had been invoked by writ of error or appeal from the District or Circuit Court, and (2) that it could not act after that jurisdiction had been exercised and exhausted?

The general intention and spirit of both the exceptions in Section 6 seems to be to authorize the Supreme Court to supersede the Court of Appeals in the exercise of appellate jurisdiction rather than to review decisions of that Court.

Brief for the Appellee in the Court of Appeals.

We assume, and it seems to be admitted by the brief of the appellant that the decision of the Supreme Court on Mr. Fassett's petition for prohibition (142 U. S., 479, and see the opinion printed in this record at page 77 *et seq.*) substantially disposes of all the questions in this case, except the single one, whether the "Conqueror" was an imported article, within the meaning of the Import Tariff Law.

If not an imported article, the Collector had no warrant of law to seize her. His act was a marine tort, which conferred upon the District Court, as a Court of Admiralty, jurisdiction to restore the ship to her owner, and to compel Mr. Fassett, as a wrongdoer, to pay damages to her owner.

FIRST POINT.

The Collector does not hold any general warrant to take private property. His lawful authority is limited to imported articles.

(A) A moment's reflection is enough to show how anomalous and startling a thing it would be if there were no limits to the Collector's authority.

> Suppose that the liquidated duties on imported goods have been paid, or legally tendered, but the Collector disputes the fact of payment or the validity of the tender, and refuses to deliver the goods to the owner. Is this an act within his authority?
>
> Or suppose the Collector to be advised by some ingenious Solicitor of the Treasury that the whole fleet of seagoing vessels by which the international trade of the country is carried on, are imported articles within the fair intendment of the Customs laws and he thereupon takes possession of every vessel which has entered his port from a foreign country and holds it for duties. Can he lawfully do this?
>
> Or, suppose he puts his officers into possession of somebody's dwelling-house and holds it for duties.

(B) Evidently the notion of the Collector's power being unlimited is not readily to be accepted. The statutes which confer upon him all the power which he has, must be scrutinized to ascertain whether they warrant such a conclusion, and, if they do not, to ascertain where the line separating the things which he may lawfully do from the things which he cannot lawfully do is drawn.

(C) There is no question here as to the Collector's authority under the laws relating to commerce and navigation or under penal laws of any kind prescribing penalties or forfeitures. Article VII. of the libel alleges that the "Conqueror" was not seized under any claim of authority therefor given by any provision of the laws of the United States relating to commerce and navigation or of any law of the United States providing a penalty or forfeiture, and that Mr. Fassett took possession of the "Conqueror" *solely* upon the claim that, the duties accruing upon her importation being unpaid, he was entitled to take and keep her in safe custody till such duties should be paid or secured in the manner provided by law for articles imported into the United States. This article of the libel is admitted.

Claim and Answer, Record, pp. 23–26.

(D) The statutes, under which the Collector is authorized to take possession of property to enforce the payment of import duties thereon, are as follows :

> Initial paragraph of the Import Tariff Act of October 1, 1890, in force at the time the "Conqueror" came to New York : "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that on and after the sixth day of October, eighteen hundred and ninety, unless otherwise specially provided for in this act, there shall be

If not an imported article, the Collector had no warrant of law to seize her. His act was a marine tort, which conferred upon the District Court, as a Court of Admiralty, jurisdiction to restore the ship to her owner, and to compel Mr. Fassett, as a wrongdoer, to pay damages to her owner.

FIRST POINT.

The Collector does not hold any general warrant to take private property. His lawful authority is limited to imported articles.

(A) A moment's reflection is enough to show how anomalous and startling a thing it would be if there were no limits to the Collector's authority.

> Suppose that the liquidated duties on imported goods have been paid, or legally tendered, but the Collector disputes the fact of payment or the validity of the tender, and refuses to deliver the goods to the owner. Is this an act within his authority?
>
> Or suppose the Collector to be advised by some ingenious Solicitor of the Treasury that the whole fleet of seagoing vessels by which the international trade of the country is carried on, are imported articles within the fair intendment of the Customs laws and he thereupon takes possession of every vessel which has entered his port from a foreign country and holds it for duties. Can he lawfully do this?
>
> Or, suppose he puts his officers into possession of somebody's dwelling-house and holds it for duties.

(B) Evidently the notion of the Collector's power being unlimited is not readily to be accepted. The statutes which confer upon him all the power which he has, must be scrutinized to ascertain whether they warrant such a conclusion, and, if they do not, to ascertain where the line separating the things which he may lawfully do from the things which he cannot lawfully do is drawn.

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levied, collected and paid upon *all articles imported from foreign countries*, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraph, respectively prescribed, namely :

R. S., Sec. 2621 : " At each of the ports to which there are appointed a collector, naval officer and surveyor it shall be the duty of the collector : * * * *Third.* To receive the entries of all ships or vessels, and of the goods, wares and merchandise imported in them. *Fourth.* To estimate, together with the naval officer, where there is one, or alone, where there is none, the amount of the dues payable thereupon, indorsing such amount upon the respective entries. *Fifth.* To receive all moneys paid for duties and take all bonds for securing the payment thereof. *Sixth.* To grant all permits for the unlading and delivery of goods."

R. S., Sec. 2774 : " Within twenty-four hours after the arrival of any vessel from any foreign port, at any port of the United States established by law, at which an officer of the Customs resides, or within any harbor, inlet or creek thereof, if the hours of business at the office of the chief officer of the Customs at such port will permit, or as soon thereafter at such hours will permit, the master shall repair to such office and make report to the chief officer of the arrival of the vessel, and he shall, within forty-eight hours after such arrival, make a further report in writing to the collector of the district, which report shall be in the form and shall contain all the particulars required to be inserted in, and verified like, a manifest. Every master who shall neglect or omit to make either of such reports and declarations, or to verify any such declaration as required, or shall not fully comply with the true intent and meaning of this section shall, for each offense, be liable to a penalty of one thousand dollars."

R. S., Sec. 2785: "The owner or consignee of any merchandise on board of any such vessel, or, in case of his absence or sickness, his known agent or factor in his name, shall, within fifteen days after the report of the master to the Collector of the district for which such merchandise shall be destined, make entry thereof in writing with the Collector, and shall in such entry specify the name of the vessel and of her master, in which, and the port or place from which such merchandise was imported, the particular marks, numbers, denominations and prime cost, including charges of each particular package or parcel whereof the entry shall consist, or, if in bulk, the quantity, quality and prime cost, including charges thereof, particularly specifying the species of money in which the invoices thereof are made out. Such entry shall be subscribed by the person making it, if the owner or consignee, in his own name, or, if another person, in his name as agent or factor, for the owner or consignee. The person making such entry shall also produce to the Collector and naval officer, if any, the original invoices of the merchandise, or other documents received in lieu thereof, or concerning the same, in the same state in which they were received, with the bills of lading for the same; which invoices shall be signed by the persons in the offices of the Collector and naval officer who have compared and examined them."

R. S., Sec. 2869: "The Collector, jointly with the naval officer, if any, or alone where there is none, shall, according to the best of his or their judgment or information, make a gross estimate of the amount of the duties on the merchandise to which the entry of any owner or consignee, his factor or agent, shall relate, which estimate shall be endorsed upon such entry and signed by the officer

making the same. The amount of the estimated duties having been first paid or secured to be paid, pursuant to the provisions of this title, the Collector shall, together with the naval officer, where there is one, or alone where there is none, grant a permit to land the merchandise, whereof entry has been so made, and then, and not before, it shall be lawful to land the merchandise."

R. S., Sec. 2870: "All permits shall specify, as particularly as may be, the merchandise to be delivered, namely, the number and description of the packages, whether trunk, bale, chest, box, case, pipe, hogshead, barrel, keg, or any other packages whatever, with the mark and number of each package, and, as far as circumstances will admit, the contents thereof, together with the names of the vessel and master, in which and the place from whence they were imported; and no merchandise shall be delivered by any inspector or other officer of the customs that does not fully agree with the description thereof in such permit."

R. S., Sec. 2963: "When *merchandise, imported into the United States, has not been entered* in pursuance of the provisions of any act regulation imports and tonnage, the same shall be deposited in the public warehouse, and shall there remain, at the expense and risk of the owner, until such invoice is produced. Nothing herein contained shall be understood to prohibit the sale of such quantities of merchandise so stored as may be necessary to discharge the duties thereon, and all intervening charges, at the time or times when such duties shall become due and payable."

R. S., Sec. 2964: "*In all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof*, or whenever

the owner, importer or consignee shall make entry for warehousing the same, in writing, in such form and supported by such proof as shall be prescribed by the Secretary of the Treasury, *the merchandise shall be taken possession of by the Collector*, and deposited in the public stores, or in other stores to be agreed on by the collector or chief revenue officer of the port, and the importer, owner or consignee, such stores to be secured under the joint locks of the inspector and importer, there to be kept, with due and reasonable care, at the charge and risk of the owner, importer, consignee or agent, and subject at all times to their order, upon payment of the proper duties and expenses, to be ascertained on due entry thereof for warehousing, and to be secured by a bond of the owner, importer or consignee, with surety to the satisfaction of the collector, in double the amount of the duties, and in such form as the Secretary of the Treasury shall prescribe."

R. S., Sec. 2973: "If any merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, except as hereinbefore provided, then such merchandise shall be appraised by the appraisers, if there be any at such port, and, if none, then by two merchants to be designated and sworn by the collector for that purpose, and sold by the collector at public auction, on due public notice thereof being first given, in the manner and for the time to be prescribed by a general regulation of the Treasury Department. At such public sale, distinct printed catalogues descriptive of such merchandise, with the appraised value affixed thereto, shall be distributed among the persons present at such sale. A reasonable opportunity shall be given before such sale to persons desirous of purchasing, to inspect the quality of such merchandise. The proceeds of such sales,

> after deducting the usual rate of storage at the port in question, with all other charges and expenses, including duties, shall be paid over to the owner, importer, consignee or agent, and proper receipts taken for the same."

(E) Under these statutes the only property which the Collector is authorized to take and hold is (1) imported articles which have not been entered; and (2) imported articles, the duties upon which have not been paid.

If he takes property which is an imported article that has not been entered or the duties upon which have not been paid he acts within his warrant.

If he takes property which is not an imported article or which, being an imported article, has been entered and the duties thereon paid, he goes beyond his warrant and is a wrongdoer. He is in the position of a sheriff who, under a warrant to seize a horse, has taken a cow.

> "The Collector has no authority to make any determination regarding any article which is not imported merchandise."
>
> *In re* Fassett, 142 U. S., at p. 487.

(F) The courts have frequently construed similar statutes to impose limitations upon the Collector's authority so that if he goes beyond the limits he becomes a wrongdoer.

In *The Apollon*, 9 Wheaton, 362, it was held that Section 29 of the act to regulate the collection of duties on imports and tonnage, passed March 2, 1799 (1 Stats., p. 648), providing that it should be lawful for collectors to arrest and bring back to the ports of the United States any vessel which, having arrived within the limits of any district of the United States from a foreign port, should depart or attempt to depart from the same before report or entry by the master with the Collector of some district of the United States, did not

authorize a collector to pursue and bring back a vessel which had passed up St. Mary's River to a Spanish port, that river then being the boundary between Spanish and American territory and its waters not being exclusively waters of the United States; and the Collector was held liable in damages in an *in personam* admiralty suit.

In *Slocum vs. Mayberry*, 2 Wheaton, 1; Slocum, Surveyor of Customs at the port of Newport, R. I., took possession of a vessel under orders of the Collector, pursuant to Section 11 of an act which read as follows: "That the collectors of the customs be, and they are hereby, respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States whenever in their opinion the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon." The owners of the cargo laden on the vessel brought replevin therefor in the Supreme Court of Rhode Island, and the judgment of that court in their favor was affirmed by the Supreme Court upon the ground that the authority given by the statute respected the vessel only, the cargo being in no manner the object of the act.

In *Tracy vs. Swartwout*, 10 Peters, 80, a Collector was held liable in damages in an action at common law for having, without legal warrant, detained in his possession, under instructions of the Secretary of the Treasury, imported sugar cane syrup.

In *McLean vs. Hager*, 31 Fed. Rep., 602, the Circuit Court for the Northern District of California held that a Collector was liable in damages in an action at common law for having taken and held the possession of certain opium which had been shipped from Honolulu to Panama, by way of San Francisco, and had been transshipped without being landed in San Francisco; the ground of the decision being that the opium had not been *imported* within the meaning of the Customs Revenue Laws, and that the Collector's act was beyond his authority, and therefore a trespass.

SECOND POINT.

The "Conqueror" is not an imported article within the meaning of the Collector's warrant.

See Judge Brown's Opinion, Record, p. 86.

(A) The "Conqueror" belongs to the class of vessels. She is a sea-going, schooner-rigged screw steamship $182\frac{6}{10}$ feet long, $24\frac{8}{10}$ feet wide, $13\frac{5}{10}$ feet deep. Her measurement, as ascertained by the Surveyor of the Port, is $371\frac{91}{100}$ tons gross, $219\frac{21}{100}$ tons net. Her crew consists of twenty-five men, and she is capable of carrying eight to ten passengers comfortably (see testimony of F. W. Vanderbilt, p. 49, and Capt. Wood, p. 60; and Collector's Certificate, p. 75).

Congress has frequently recognized the fact that water-craft of very much smaller capacity than the "Conqueror" are vessels within the meaning of that term, as Congress uses it.

See Act June 19th, 1886, 24 Stats., 79, Sec. 7: "Every vessel of twenty tons or upwards;" "every vessel of less than twenty and not less than five tons" (Sec. 4, "Sea-going vessels").

See Act July 9th, 1886, 24 Stats., 129: "Steam vessels of one hundred tons burden or under."

See Act July 3d, 1789, 1 Stats., pp. 29, 48, Sec. 40: "Ship or vessel less than thirty tons burden."

See Act Sept. 1st, 1789, 1 Stats., pp. 55, 61, Sec. 23: "Ship or vessel of the burden of twenty tons or upwards."

See Act Sept. 24th, 1789, 1 Stats., pp. 73, 77: "Waters which are navigable from the sea by vessels of ten or more tons burden."

The "Conqueror" plainly falls under one or other of the provisions of the statutes relating to tonnage duties, viz.:

R. S., Sec. 4219 (as amended in 1877, 19 Stats., p. 250): "Upon vessels which shall be entered in the United States from any foreign port or place there shall be paid duties as follows: On vessels built within the United States but belonging wholly or in part to subject of foreign powers, at at the rate of thirty cents per ton. On other vessels not of the United States at the rate of fifty cents per ton. Upon every vessel not of the United States, which shall be entered in one district from another district, having on board goods, wares or merchandise taken in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton. Nothing in this section shall be deemed in any wise to impair any rights or privileges which had been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels. On all foreign vessels which shall be entered in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, there shall be paid a duty at the rate of two dollars per ton; and none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. In addition to the tonnage duty above imposed, there shall be paid a tax, at the rate of thirty cents per ton, on vessels which shall be entered at any custom house within the United States from any foreign port or place; and any rights or privileges acquired by any foreign nation under the laws and treaties of the United States relative to the duty of tonnage on vessels shall not be impaired; and any vessel any officer of which shall not be a citi-

zen of the United States, shall pay a tax of fifty cents per ton."

Section 14 of "the Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," passed June 26, 1884 (23 Stats., page 57, as amended by the Act of June 19, 1886, 24 Stats., 81), viz.:

SEC. 14. "That in lieu of the tax on tonnage of thirty cents per ton per annum, imposed prior to July first, eighteen hundred and eighty-four, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports, not, however, to include vessels in distress or not engaged in trade: Provided that the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any foreign port, as may be in excess of the tonnage and lighthouse dues, or other equivalent tax or taxes, imposed in said port on American vessels by the Government of the foreign country in which such port is situated, and shall, upon the passage of this act, and from time to time thereafter as often as it may become necessary by reason of changes

in the laws of the foreign countries above mentioned, indicate by proclamation the parts to which such suspension shall apply, and the rate or rate, of tonnage duty, if any, to be collected under such suspension; provided, further, that such proclamation shall exclude from the benefits of the suspension herein authorized the vessels of any foreign country in whose courts the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels; and Sections forty-two hundred and twenty-three and forty-two hundred and twenty-four, and so much of Section forty-two hundred and nineteen of the Revised Statutes as conflicts with this section, are hereby repealed."

R. S., Sec. 4216. "Yachts belonging to a regularly organized yacht club of any foreign nation which shall extend like privileges to the yachts of the United States, shall have the privilege of entering or leaving any port of the United States without entering or clearing at the Custom Houses thereof, or paying tonnage tax."

It is plainly liable to pay "light money" as a vessel "not of the United States," under R. S., Sec. 4225, viz.:

"A duty of fifty cents per ton, to be denominated 'light money,' shall be levied and collected on all vessels not of the United States which may enter the ports of the United States. Such light money shall be levied and collected in the same manner and under the same regulations as the tonnage duties."

Unless it is exempt under the following provisions of Section 4226, namely:

> "The preceding section shall not be deemed to operate upon the unregistered vessels, owned by citizens of the United States, and carrying a sea letter, or other regular document, issued from a Custom House of the United States, proving the vessel to be American property."

The Collector at New York levied light money on the "Conqueror" on her first entry at that port, and so treated her as a vessel.

She is also treated as a vessel in the instructions of the Treasury Department recited in the petition herein which designate her by the term "vessel," and direct the Collector to refer the question of her liability to tonnage duty to the Commissioner of Navigation.

(B) A sharp discrimination between *vessels* and *imported articles* is everywhere manifest in the statutes.

As used by Congress, the phrase "imported articles" does not and never has included seagoing vessels of any kind whatsoever. The effect of the statutes is to create two mutually exclusive classes of things coming into the United States: (1) vessels subject (with particular exemptions) to tonnage duties; and (2) imported articles subject (with particular exemptions) to *ad valorem* or specific duties.

This discrimination is implied in the constitutional provisions, clauses 2 and 3 of Section 10 of Article 1.

It is very clearly brought out in our treaties of navigation and commerce with various nations. See for example the Treaty of 1815 with Great Britain, Article II.

And it appears everywhere in the administrative provisions of the Revised Statutes.

> By R. S., Sec. 337, Collectors are required for statistical purposes, to keep distinct accounts of imported articles and of the character and tonnage of all vessels which enter and depart from their districts.

So, again, the provisions for "entering vessels" and for "entering imported articles" are distinct (as to vessels, see R. S., Sec. 2770–2774; as to imported articles, Sec. 2785 and Sec. 5 of the Administrative Act of June 10, 1890).

See also Section 2795 (sea stores of vessels).
Sec. 2798 (steamship's stock of coal).
Sec. 2806–7 (manifests of vessels).
Sec. 2872 (unlading of vessels).
Sec. 3059 (search of vessels).
See also generally R. S. Title 34, Chapter 4, entry of merchandise; Chapter 5 on unlading; Chapter 6 on appraisal; Chapter 7 on the bond and warehouse system; Chapter 10, enforcement of duty laws and punishment for violation; Administrative Act of June 10, 1890.

(C) This discrimination has been maintained from the foundation of the Government, and is marked in several adjudged cases.

Compare the second, third and fifth acts passed by the first Congress; the Act laying duties on "Goods, Ware and Merchandises imported into the United States," passed July 4, 1789 (1 Stats., p. 24); the Act imposing tonnage duties "on all ships or vessels entered in the United States" (1 Stats., 27); the Act regulating the "Collection of the Duties imposed by law on the tonnage of ships or vessels and on goods, wares and merchandises imported into the United States" (1 Stats., 29).

In "*The Gertrude*," 3 Story, 68, a British brig, while temporarily stranded on the Maine Coast, was sold, and the purchaser hauled her off and brought her into Eastport. Her anchors, cables and rigging were taken ashore and sold. Forfeiture proceedings were instituted against the brig on the ground that goods, wares and mer-

chandise imported by her into the United States had been unladen without a permit. One of the questions was whether those articles were goods, wares and merchandise imported into the United States without the true intent and meaning of the Revenue Laws. WARE, J., in the District Court held that they were not. In his opinion, which was adopted by STORY, J., in the Circuit Court, it is said: "The rigging and apparel of a ship are a part of the ship, and therefore not merchandise in any other sense of the word than that in which the ship herself is. * * * The Revenue Laws in all cases contemplate a ship as a single object, and when it is subjected to any fiscal charge it is imposed under the name of a tonnage duty. The rigging, furniture and appurtenances are a part of the ship. * * * My opinion is that the materials and rigging of a foreign vessel cast upon our shore as a wreck, when landed and sold, do not come within the purview of the Revenue Laws as merchandise imported."

See also U. S. vs. A Chain Cable, 2 Sumner, 362.

(D) The fact that the yacht, being foreign built, is owned by an American citizen, does not take it out of the class of "vessels" and put it into the class of "imported articles." These facts make it liable to burdens if it engages in either the foreign or the domestic trade of the United States; but, though it is a vessel subject to restrictions, it is none the less a vessel.

There is nothing whatever in any of the statutes which shows that Congress intended that such a vessel should be treated as an imported article. On the contrary, the statutes contemplate that just such vessels under the description of "vessels not of the United States" "entered in the United States from any foreign port" may be liable to tonnage duties

(Sec. 4219); that just such vessels under the description of "yachts belonging to a regularly organized yacht club of any foreign nation which shall extend like privileges to the yachts of the United States" may have the privilege of entering or leaving any port of the United States without entering or clearing at the Custom Houses thereof or paying tonnage tax (Sec. 4216); that just such vessels under the description of "vessels not of the United States" may be liable to light money (Sec. 4225); that just such vessels under the description of "vessels not of the United States," "owned by citizens of the United States and carrying a sea letter, or other regular document, issued from a Custom House of the United States, proving the vessel to be American property" may be exempt from light money (Sec. 4226); that just such vessels under the description of "unregistered vessels owned by a citizen of the United States, and sailing with a sea letter, going to any foreign country" may be furnished with a passport (Sec. 4308); that just such vessels under the description of "vessels which shall be wholly owned by citizens of the United States, and furnished with or entitled to sea letters or other Custom House documents," may be furnished with documents proving them to be the property of citizens of the United States (Sec. 4190).

The Treasury Department in Articles 93–97 of its general regulations under the Customs and Navigation Laws issued by Secretary Folger in 1884, recognizes the fact that foreign-built vessels, owned by citizens of the United States, are "vessels" and not "imports." These regulations are as follows:

Undocumented Vessels Wholly Owned by Citizens of the United States.

ART. 93. Foreign-built or denationalized vessels purchased and wholly owned by citizens of the United States, whether purchased of belligerents

or neutrals during a war to which the United States are not a party, or in peace, of foreign owners, are entitled to the protection of the authorities and flag of the United States, as the property of American citizens, although no register, enrollment, license or other marine document prescribed by the laws of the United States can be lawfully issued to such vessels.

ART. 94. To enable, however, the owners of a vessel so circumstanced to protect their rights, if molested or questioned, the collector of the customs, though forbidden by law to grant any marine document or certificate of ownership, may lawfully make record of the bill of sale in his office, authenticate its validity in form and substance, and deliver to the owner a certificate to that effect, certifying, also, that the owner is a citizen of the United States.

These facts, thus authenticated, if the transfer was in good faith, entitle the vessel to protection as the lawful property of a citizen of the United States; and the authentication of the bill of sale and of citizenship will be *prima facie* proof of such good faith.

ART. 95. In all cases, therefore, where the evidence of the purchase of a foreign vessel by a citizen of the United States, with proof of citizenship and of the *bona fide* character of the purchase, shall be furnished to a collector of the customs, he will, if the proof be satisfactory, and purchase deemed in good faith, record the bill of sale in his office, and deliver to the party the original with a certificate endorsed thereon in the following form:

FORM NO. 29.

CERTIFICATE UPON BILL OF SALE.

I, , collector of the customs for the port of in the State of in the United States of America, do hereby certify that the within bill of sale, bearing date of of the (here describe the vessel, her tonnage, denomination, name, &c.) sold and transferred by to is, in form and substance, valid and effective in law, and has been duly recorded in my office; and that the said (meaning the owners) are citizens of the United States.

As witness my hand and seal this day of in the year of our Lord 18 .

[L. S.]

ART. 96. Before granting such certificate, the collector of the customs will require the tonnage of the vessel to be duly ascertained in pursuance of law, and insert the same in the description of the vessel in his certificate.

ART. 97. A separate record will be kept of these vessels, and in the tonnage returns they will be reported in a separate column under the head of "Foreign-built or undocumented vessels owned by citizens of the United States."

The course of the Department of State has been similar. Thus in the Consular Regulations issued by Secretary Bayard February 3, 1888, it was provided as follows:

Article XIX.

Duties of Consular officers in respect of American or foreign, built vessels transferred to citizens of the United States within their jurisdiction.

"311. The right of American citizens to acquire property in foreign ships has been held to be a natural right, independent of statutory law, and such property is neither more or less entitled to protection by the United States than any other property of an American citizen.

312. The existing General Regulations of the Treasury Department under the Customs and Navigation Laws (Customs Regulations, 1884) recognize the right of property in vessels of this character, and declare them to be entitled to the protection of the authorities and to the flag of the United States, although no register, enrollment, license or other marine document prescribed by the laws of the United States can lawfully be issued to such vessels whether they are American or foreign built. The former practice of issuing sea-letters in the case of the purchase abroad of American or foreign vessels by citizens of the United States is no longer authorized. Nevertheless, though the issuing of sea-letters to such ships is not now authorized, yet there would seem to be no good reason upon the face of our present legislation why the Department should not resume the practice, in case the United States should be a neutral in a war between maritime powers, if it should deem such letters more protective in their character than consular or customs certificates of sale.

313. But, in view of existing regulations, and to enable the owners of a vessel so situated to protect their rights, if molested or questioned, a Consular officer, though forbidden by law to grant any marine document or certificate of ownership, may lawfully make record of the bill of sale in his

office, authenticate its execution, and deliver to the purchaser a certificate to that effect; certifying, also, that the owner is a citizen of the United States. Before granting such a certificate the Consular officer will require the tonnage of the vessel to be duly ascertained in pursuance of law, and insert the same in the description of the vessel in his certificate (see Form No. 35). These facts thus authenticated, if the transfer is in good faith, entitle the vessel to protection, as the lawful property of a citizen of the United States; and the authentication of the bill of sale and of citizenship will be *prima facie* proof of such good faith.

314. The authority of a Consular officer to authenticate transfer of a foreign vessel is wide in its effect, and imposes great responsibility in making him, in the first instance at least, the sole judge of the good faith of the transaction. The question of the honesty and good faith of such a sale rises into the gravest importance in the event of a war between two or more powers, in which the Government of the United States is a neutral. In such a war experience justifies the expectation that the citizens or subjects of one or more of the belligerents will seek to protect their shipping by a transfer to a neutral flag. In some instances this may honestly be done; but the sales of the vessels of belligerents in apprehension of or in time of war are always and properly liable to suspicion, and they justify the strictest inquiry on the part of the belligerent who may thereby have been defrauded of his right to capture the enemy's property. The acceptance of the pretended ownership of a vessel under these circumstances may be very profitable, and the temptation to abuse his trust in such a case, to which a Consular Officer is subjected, may be too great for persons of ordinary integrity, discernment and firmness to withstand. Instances are not wanting in which citizens of the United

States who were wholly incapable, from their previous well-known conditions and pursuits, of making such a purchase, have appeared as owners under sales of this character, and have sought for them the protection of the Government.

315. It is, accordingly, the duty of a Consular officer to use all the available means, especially during the existence of a war to which this Government is not a party, to satisfy himself that the sale of the vessel is made in good faith and without a fraudulent intent. A considerable discretion and responsibility rest upon him in the determination of the good faith of such transactions. It is not to be concluded that all such sales, even in time of peace, are honest and free from collusion or fraud. It is the duty of the Consular officer to notice all circumstances that throw doubt on the good faith of the transaction, or point to its fictitious character, and, if he is satisfied in this respect, to refuse to grant his certificate. On the other hand, he is not permitted to regard the mere fact of the sale of a vessel to an American citizen as any evidence of fraud. The presumption must be otherwise ; and, in the absence of any indication of dishonesty, a sale in the regular way, with the usual business formalities, is to be regarded as made in good faith.

316. When, however, the Consular Officer shall have satisfied himself, after the investigation with which he is charged, that the sale of the vessel is not fictitious, and is made in good faith, and that the purchaser is a citizen of the United States, it is his duty, when requested, to record the bill of sale in the Consulate, and to deliver the original to the purchaser, with his certificate annexed thereto, according to form No. 35. A copy of the bill of sale, together with any other papers belonging to the transfer, and of the Consular certificate, should be sent without delay to the Department

of State, with a report of the facts and circumstances of the transaction.

317. The privilege of carrying the flag of the United States is under the regulation of Congress, and it may have been the intention of that body that it should be used only by regularly documented vessels. No such intention, however, is found in any statute. And as a citizen is not prohibited from purchasing and employing abroad a foreign ship, it is regarded as reasonable and proper that he should be permitted to fly the flag of this country as an indication of ownership, and for the due protection of his property. The practice of carrying the flag by such vessels is now established. The right to do so will not be questioned, and it is probable that it would be respected by the courts.

318. It should be understood, however, that such foreign-built vessels not registered, enrolled, or licensed under the laws of the United States, although wholly owned by citizens thereof, cannot legally import goods, wares, or merchandise from foreign ports, and are subjected in the coasting trade to disabilities and exactions from which documented vessels of the United States are exempt.

319. On arrival from a foreign port, such undocumented foreign-built vessels, if laden with goods, wares, or merchandise, will, with their cargoes, be subjected to forfeiture. If in ballast only, or with passengers without cargoes, they will be subjected to a heavy tonnage duty. When in foreign ports they are also subject to tonnage and other Consular fees from which regularly documented vessels are exempt. For instructions respecting the shipment and discharge and relief of seamen on vessels of this character, and the collection of extra wages, Consular officers are referred to in the several articles on these subjects."

This is no new thing. The grouping by the Treasury Department of "all ships and vessels belonging to citizens of the United States" in one class, whether they are technically "vessels of the United States" or not, goes back to Secretary Hamilton's Instructions to Collectors, of May 13, 1793. Those instructions, together with copies of the documents at that time customarily furnished to vessels belonging to citizens of the United States, may be found in a case decided by the Court of Errors, in New York, in 1807; *Sleght vs. Hartshorne*, 2 Johns., 531. That case also contains a review of the early statutes and treaties, which is thus summarized by CLINTON, Senator, in the Opinion of the Court (pp. 544-546):

> "It has been the policy of the United States, in common with other commercial nations, to encourage their own ships. Our navigation act enumerates and describes certain vessels, and emphatically denominates them ships or vessels of the United States. Their distinguishing characteristics are, that they are built, owned and commanded by citizens of this country. They are registered with the Collector, and are entitled to a certificate, called a register. The register is of itself considered a competent document, to prove the ship American; and would, in most cases, serve as a sufficient protection against capture. But cases occur wherein this register is not granted to vessels owned by citizens of the United States. The principal case is where the vessel is built out of the country. In such case, the Collector cannot grant a register; but it being proper and necessary, that the owner should have some document to protect his property against the rapacity of cruisers on the ocean, and to establish his neutrality, a formula has been devised, and is granted, called a certificate of ownership. With a view to the encouragement of ship building in

this country, a discrimination is also made in the duties of tonnage. Ships of the United States pay at the rate of six cents per ton ; ships built within the United States after a certain period, but belonging wholly or in part to foreigners, thirty cents per ton ; and all other ships fifty cents per ton. Hence, under both heads, of ownership and the place of building, all vessels are considered, by our laws, under four distinct views : 1. Vessels of the United States. 2. Vessels built in the United States owned by foreigners. 3. Vessels built out of the United States, owned by citizens. 4. Vessels built out of the United States, owned by foreigners. Vessels of the first and third classes, being owned by citizens, are entitled to the protection of the Government. The second and fourth classes, being owned by foreigners, cannot receive any documents which would in the least protect them from capture. To encourage our own shipbuilding, vessels of the United States pay but a small duty of six cents. Vessels built and owned here by foreigners, pay a duy of thirty cents; and, if our citizens will go into foreign countries to build or to purchase vessels. they are put on the same footing as foreigners owning foreign vessels, with regard to the rate of duties, although, as citizens, they have a right to demand the protecting hand of the Government for their property. Hence arises the division of vessels owned by citizens into two classes, vessels of the United States, or registered vessels, and vessels belonging to the citizens of the United States, certificated but not registered."

Against the opinion of the Solicitor of the Treasury, delivered in the year 1891, we set the opinion of Secretary Hamilton in 1793, the opinion of Secretary Folger in 1884, and the uninterrupted practice of the Treasury Department for ninety-eight years.

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Against the opinion of the Solicitor of the Treasury, delivered in the year 1891, we set the opinion of Secretary Hamilton in 1793, the opinion of Secretary Folger in 1884, and the uninterrupted practice of the Treasury Department for ninety-eight years.

(E) The fact that the "Conqueror" is a pleasure vessel—not intended to be used in the transportation of goods or persons for hire—does not take her out of the class of vessels and put her into the class of imports.

There is absolutely no warrant in the statutes for the idea that the fact of a vessel not being used in trade, changes her statutory classification. On the contrary, the fact that Congress specifically exempts yachts belonging to foreign yacht clubs from tonnage tax (R. S., Sec. 4216), and the fact that the present tonnage duty statute, Section 14 of the Act of June 26th, 1884, 23 Stats., p. 57, as amended by the Act of June 19th, 1886, 24 Stats., 81 (quoted *supra*), provides that a duty of six cents per ton, not to exceed thirty cents per ton per annum, shall be imposed at each entry upon all vessels which shall be entered in the United States from certain foreign ports, "*not however, to include vessels in distress or not engaged in trade,*" is an express recognition that pleasure yachts are vessels, as that term is used by Congress.

(F) The fact that Congress authorized the granting of an American registry to the Canadian steam ferryboat "Geneva" "upon the payment into the United States Treasury of the duties legally chargeable upon said vessel" (20 Stats., p. 473), does not warrant the inference that Congress considers that import duties are ever chargeable upon vessels.

No inference as to the meaning of general laws can be drawn from the language used in private acts. Presumptively, the language of private acts is the language of the beneficiary. Somebody applies to Congress for a favor, and the favor is granted as asked for. By the Act of February 13th, 1889 (25 Stats., 668), the Commissioner of Navigation was authorized "to license as a vessel of the United States the Canadian steam yacht 'Nautilus,'" without imposing any condition as to the payment of duties. It would be as reasonable

for us to argue from this private act as it is for the District Attorney to argue from the act relating to the ferryboat "Geneva."

Moreover, there is nothing in the "Geneva" Act which indicates that Congress meant import duties by the phrase "duties legally chargeable on said vessel." The Treasury Department held that the ferryboat must pay import duties, but it based the decision largely upon the ground that the owner, by *entering her as an import*, was estopped to deny that she was such (Treasury Decisions, SS. 8975). The question was never litigated in Court.

(G) The various Treasury decisions cited by the District Attorney as to non-seagoing yachts brought into this country as merchandise on other vessels, and as to small craft coming across a river or a lake into this country for use solely on our rivers and lakes, have no proper bearing on the present controversy.

Perhaps these small crafts were not properly to be regarded as vessels. There may have been difficulty and doubt in classifying them. Wherever there are coterminous classes there always is difficulty and doubt as to things which lie near the boundary line. But this is no reason for taking a thing which manifestly belongs to one class and putting it into another class. That would be to abolish the classes altogether. The "Conqueror" is nowhere near the boundary line. It is manifestly a vessel.

The report of the Collector to the Treasury Department as to the "Conqueror" (Libellant's Exhibit G, pp. 60, 63) well disposes of these Treasury decisions.

(H) The settled policy of our Government from the adoption of the Constitution until the present time has been to accomplish both the purpose of raising revenue and the purpose of protecting home industries in respect of vessels, by imposing upon them duties upon

tonnage and not by taxing them as "imported merchandise."

This policy has been applied in respect of sea-going vessels of every description, including as well foreign-built vessels, owned by citizens of the United States, as other vessels.

The letter of Secretary Hamilton in 1793, the Act of March 2, 1803, 2 Stat., p. 208, the Act of March 26, 1810, 2 Stat., p. 568, and the facts portrayed in the above cited decision of the New York Court of Errors, in the case of Sleght vs. Hartshorne, in 1807, show that the existence of a class of vessels to which the yacht "Conqueror" belongs, viz., foreign-built vessels, owned by American citizens, was present in the minds of both the Legislature and the Executive, and that great difficulty was experienced in determining the precise rights and privileges which should be accorded to the owners of such vessels. The Treasury regulations of 1884 show that the same subject was before the Treasury Department at that time.

Vessels of this character were so frequently entering and departing from the ports of the United States as to call for *rules and regulations*, both by statute and by Executive action, yet never during the whole period in any of the numerous Tariff Acts which have been passed can a word be found which indicates the intention to distinguish between that class of vessels and other vessels entering American ports by taxing them as imported merchandise.

As to the raising of revenue: the uniform and unvarying rule has been to raise revenue from imported merchandise by imposing upon it taxes either specific or *ad valorem*, and to raise revenue from vessels entering American ports by imposing upon them taxes measured in accordance with their tonnage.

As to the protection of American ship building, the uniform and unvarying rule has been to accomplish it in two ways:

1st. By imposing differential tonnage duties which discriminate against the vessels of American citizens built abroad equally with the vessels of foreigners built abroad, with the further discrimination against vessels owned by American citizens arising from the fact that foreign-built vessels owned by foreigners may be relieved from the discriminating duty by treaty or by Executive proclamation based upon the principles of reciprocity, while foreign-built vessels owned by Americans have no such opportunity of relief.

2d. By prohibiting foreign-built vessels owned by American citizens from engaging in portions of the trade of the United States (*e. g.*, Rev. Stats., Sec., 2497), thus putting them at a disadvantage not merely as against American built vessels owned by American citizens, but at a disadvantage in comparison with foreign-built vessels owned by foreigners.

THIRD POINT.

The decision of the Collector, or rather of the officials of the Treasury Department whose orders he obeyed, that the "Conqueror" is an imported article, does not make her so; nor does that decision in any way affect the legal quality of the Collector's act in taking possession of the yacht.

(A) This point was necessarily involved and expressly passed upon by the Supreme Court in the prohibition proceedings,

Ex p. Fassett, 142 U. S., 479.

The Solicitor-General said in that case: "We contend, on behalf of the Collector, that when he took possession of the vessel *and decided that the same was dutiable*, the only remedy open to the owner of the vessel was to pay the duties under protest, and in this way secure possession of his vessel, with the right thereafter, as provided in the Act of June 10, 1891, to obtain a refund of those duties by appeal from the decision of the Collector to the Board of the United States General Appraisers, and by appeal from that board to the Circuit Court of the United States," &c.

The Supreme Court held that there was no such remedy for the reason that the Collector had no authority to determine the question whether an article was imported or not, and the Board of General Appraisers had no authority to review a decision on that question by the Collector.

They say: "The decisions of the Collector from which appeals are provided for by Sec. 14 are only decisions as to 'the rate and amount' of duties charged upon imported merchandise, and decisions as to dutiable costs and charges, and decisions as to fees and exactions of whatever character. Nor can the court of review pass upon any question which the Collector had not original authority to determine. *The Collector had no authority to make any determination regarding any article which is not imported merchandise;* and, if the vessel in question here is not imported merchandise, the court of review would have no jurisdiction to determine any matter regarding that question, and could not determine the very fact which is in issue under the libel in the District Court, on which the rights of the libellant depend."

(B) The question whether the decisions of executive officers as to matters upon which their jurisdiction depends are of any binding force, has frequently been before this Court. It has been held in a large number and variety of cases that such decisions, if erroneous, are nullities.

Few executive officers have larger or more important quasi-judicial functions to perform than the officials of the Land Office; yet if the Land Office issues a patent for land to which the United States has no title, or for land which Congress has not authorized to be conveyed, or for land which has been reserved from conveyance, the patent is not simply irregular and voidable only in some direct proceeding provided by law for the purpose and standing as valid until avoided; but it is absolutely and for all purposes void *ab initio*.

Doolan vs. Carr, 125 U. S., 618.
Smelting Company vs. Kemp, 104 U. S., 636.
Sherman vs. Burck, 93 U. S., 209.
Best vs. Polk, 18 Wall., 112.
Wilcox vs. Jackson, 13 Peters, 511.
Polk's Lessee vs. Wendal, 9 Cranch, 87.

So military officers seizing whisky under a statute authorizing them to seize liquor which they have reason to suspect is about to be introduced *into Indian country* are liable as trespassers, if the place to which they suppose the whiskey is about to be taken is not Indian country.

Bates vs. Clark, 95 U. S., 204.

So customs officials, taking property under an erroneous belief or under instruction of their superior officers that they are authorized to do so, are trespassers.

The Apollon, 9 Wh., 362.
Slocum vs. Mayberry, 2 Wh., 1.
Tracy vs. Swartwout, 10 Pet., 80.
McLean vs. Hagar, 31 Fed. Rep., 602.

(C) So far under this point we have assumed that the Collector did exercise some judgment and make some decision as to this yacht. The fact is not so.

According to his answer in the District Court, the Collector knows nothing about the yacht. According to his answer and according to his petition to the Su-

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(C) So far under this point we have assumed that the Collector did exercise some judgment and make some decision as to this yacht. The fact is not so.

According to his answer in the District Court, the Collector knows nothing about the yacht. According to his answer and according to his petition to the Su-

preme Court, he acted in *obedience* to the instructions of the Secretary of the Treasury (Record, p. 66). If there were any statute, therefore, which would protect a Collector against acts based upon his *decision* that the yacht is an "imported article" it would not avail in this particular case. What is needed is some statute authorizing the Secretary of the Treasury to decide that matter and protecting Collectors against the consequences of an erroneous decision on the part of the Secretary if they obey the Secretary's orders. There is no such statute.

(D) The actual and only decision of the *Collector* was that this was a vessel taxable as such.

And he has taxed her as such under the light money statute (§ 4225).

Record, pp. 61, 113, 114.
See letter of Deputy Collector Couch, Record, pp. 61-64.

FOURTH POINT.

If this Court can act upon the case the decree should be affirmed with costs.

ELIHU ROOT,
S. B. CLARKE,
BRONSON WINTHROP,
Of Counsel.

166-373

Office Supreme Court, U. S.
FILED.
JAN 6 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 98.

THE STEAM YACHT "CONQUEROR,', &c., Appellants,

vs.

FREDERICK W. VANDERBILT, Appellee.

APPENDIX TO BRIEF FOR APPELLEE.

ACTS OF CONGRESS SHOWING USE OF THE WORDS "ARTICLES" AND "GOODS, WARES, AND MERCHANDISE."

Act of 1789, chapter 2:

SECTION 1. "Whereas it is necessary for the support of Government, for the discharge of the debts of the United States and the encouragement and protection of manufactures that duties be laid on *goods, wares and merchandise* imported:

Be it enacted, * * * That * * * the several duties hereinafter mentioned shall be laid on the following

goods, wares and merchandises imported into the United States from any foreign port or place."

Act of 1789, chapter 5 :

SECTION 1. "That for due collection of the duties imposed by law on the tonnage of ships and vessels and on goods, wares and merchandises imported into the United States there shall be established and appointed districts, ports and officers in manner following :

* * * * * * *

SECTION 19. "That all duties on goods, wares and merchandise imported shall be paid by the importer before a permit shall be granted for landing the same."

* * * * * * *

SECTION 20. "That all duties imposed by law on the tonnage of any ship or vessel shall be paid to the collector within ten days after entry made and before such ship shall be permitted to clear out."

* * * * * * *

Act of May 2, 1792, volume 1, page 259 :

"That from and after the last day of June next, the duties now in force upon the *articles* hereinafter enumerated and described, at their importation into the United States, shall cease, and that in lieu thereof, there shall be thenceforth laid, levied and collected, upon the said *articles*, at their said importation, the several and respective rates or duties following, viz."

Act of January 29, 1795, volume 1, page 411 :

"Whereas difficulties have arisen in ascertaining the duties on certain *articles* imported into the United States, and further provisions for securing the collection of the impost duties, are found necessary.

* * * * * * *

SECTION 6. That the duties aforesaid shall be collected in like manner, and under the same regulations, restrictions and provisions, and subject to the like appropriations, as *goods, wares and merchandise* imported into the United States are now subject to."

Act of March 3, 1797, volume 1, page 503:

"That from and after the 30th day of June next the following duties now in force and payable upon the *articles* hereinafter enumerated shall be laid, levied, and collected upon those *articles* respectively on their importation into the United States from any foreign port or place.

* * * * * * *

SECTION 3. That an addition of ten per centum, shall be made to the several rates of duties above specified and imposed, in respect to all such *goods, wares and merchandise* as aforesaid, as shall, after the said last day of June next, be imported in ships or vessels, not of the United States.

SECTION 4. That the duties laid by this act, shall be levied and collected in the same manner, and under the same regulations and allowances as to drawbacks, mode of security, and time of payment, respectively, with the several duties now in force on the respective *articles* hereinbefore enumerated."

Act of April 27th, 1816:

"That from and after the 30th day of June, 1816, the *duties heretofore laid by law on goods, wares and merchandise* imported into the United States shall cease and determine, and there shall be levied and collected and paid the several duties hereinafter mentioned, that is to say:"

Act of May 22, 1824, volume 4, page 25:

"That from and after the thirtieth day of June, one thousand eight hundred and twenty-four, in lieu of the duties

now imposed by law on the importation of the *articles* hereinafter mentioned, there shall be levied, collected and paid, the following duties, that is to say:

* * * * * * *

SECTION 2. That an addition of ten per centum shall be made to the several rates of duties hereby imposed upon the several *articles* aforesaid, which, after the said respective times for the commencement of the duties hereby imposed, shall be imported in *ships or vessels of the* United States: *Provided*, That this addition shall not be applied to *articles imported in ships or vessels*, not of the United States, entitled by treaty, or by any act of Congress, to be admitted on payment of the same duties that are paid on like articles imported in ships or vessels of the United States."

Act of May 19, 1828, volume 4, page 270:

"That from and after the first day of September, one thousand eight hundred and twenty-eight, in lieu of the duties now imposed by law, on the importation of the *articles* hereinafter mentioned, there shall be levied, collected, and paid, the following duties, that is to say:

SECTION 10. That it shall be the duty of the Secretary of the Treasury, under the direction of the President of the United States, from time to time, to establish such rules and regulations, not inconsistent with the laws of the United States, as the President of the United States shall think proper, to secure a just, faithful and impartial appraisal of all *goods, wares and merchandise* as aforesaid, imported into the United States."

* * * * * * *

Act of May 28, 1830, volume 4, page 409:

SECTION 5. "That it shall be the duty of the collector to cause all *goods* entered for re-exportation, with the right of drawback, to be inspected, and the *articles* thereof compared with their respective invoices, before a permit shall be given for lading the same."

Act of July 14, 1832, volume 4, page 583:

SECTION 2. "That from and after the third day of March, one thousand eight hundred and thirty-three, in lieu of the duties now imposed by law, on the importation of the *articles* hereinafter mentioned, there shall be levied, collected and paid, the following duties, that is to say:"

Act of August 30, 1842, volume 5, page 548:

"That from and after the passage of this act in lieu of the duties heretofore imposed by law on the *articles* hereinafter mentioned and on such as may now be exempt from duty there shall be levied:

* * * * * *

SECTION 12. That on and after the day this act goes into operation the duties on all imported *goods, wares, or merchandise* shall be paid in cash."

* * * * * * *

Act of 1846, chapter 74, July 30, volume 9, page 42:

"That from and after the first day of December, 1846, in lieu of the duties heretofore imposed by law on the *articles* hereinafter mentioned and on such as may now be exempt from duty, there shall be levied, collected and paid on the *goods, wares and merchandise* herein enumerated and provided for imported from foreign countries the following rates and duties, that is to say:"

Act of 1857, March 3:

"That on and after the first day of July, 1857, ad valorem duties shall be imposed in lieu of those now imposed upon *goods, wares and merchandise* imported from abroad into the United States, as follows:"

Act of August 5, 1861, volume 12, page 292:

"That from and after the date of the passage of this act, in lieu of the duties heretofore imposed by law on the *articles* hereinafter mentioned, and on such as may now be exempt from duty, there shall be levied, collected and paid on the *goods, wares and merchandise* herein enumerated and provided for imported from foreign countries the following duties and rates of duty, that is to say:

* * * * * * *

"SECTION 3. That all *articles, goods, wares and merchandise* imported from beyond the Cape of Good Hope *in foreign vessels* not entitled by reciprocal treaties to be exempt from discrimination duties, tonnage and other charges, and all *other articles, goods, wares and merchandise* not imported direct from the place of their growth or production, *or in foreign vessels* entitled by reciprocal treaties to be exempt from discrimination duties, tonnage and other charges, shall be subject to pay in addition to the duties imposed by this act 10 per centum ad valorem, provided that this rule shall not apply to *goods, wares and merchandise* imported from beyond the Cape of Good Hope in American vessels."

Act of July 14, 1862, volume 12, page 543:

"That from and after the first day of August, A. D. 1862, in lieu of the duties heretofore imposed by law on *the articles* hereinafter mentioned, there shall be levied, collected and paid on the *goods, wares and merchandise* herein enumerated and provided for, imported from foreign countries, the duties and rates of duty, &c."

Act of June 30, 1864, volume 13, page 202:

"That on and after the first day of July, 1864, in lieu of the duties heretofore imposed by law on the *articles* hereinafter mentioned, there shall be levied,

collected and paid on the *goods, wares, and merchandise* herein enumerated and provided for, imported from foreign countries, the following duties and rates of duty, that is to say:

* * * * * * *

"SECTION 2. That on and after the day and year aforesaid, in lieu of the duties heretofore imposed by law on the *articles* hereinafter mentioned, there shall be levied, collected and paid on the *goods, wares and merchandise* enumerated and provided for in this section, imported from foreign countries, the following duties and rates of duty:"

* * * * * * *

Act of July 28, 1866, volume 14, page 328:

"That from and after the tenth day of August, eighteen hundred and sixty-six, in lieu of the duties now imposed by law on the *articles* mentioned and embraced in this section, there shall be levied, collected and paid on all *goods, wares and merchandise* imported from foreign countries, the duties heretofore (hereinafter) provided, viz:

* * * * * * *

"SECTION 12. That upon the reimportation of *articles* once exported of the growth, product or manufacture of the United States, upon which no internal tax has been assessed or paid, or upon which such tax has been paid and refunded by allowance or drawback, there shall be levied, collected and paid a duty equal to the tax imposed by the internal-revenue laws upon such articles."

Act of 1870, July 14, section 21:

"That after the 31st day of September, 1870, in lieu of the duties now imposed by law on the *articles* hereinafter enumerated and provided for, imported from foreign countries, there shall be levied, collected and paid the following duties and rates of duty:"

* * * * * * *

Act of June 6, 1872, volume 17, page 230:

That on and after the first day of August, 1872, in lieu of the duties hereinafter imposed by law on the *articles* hereinafter enumerated and provided for, imported from foreign countries, there shall be levied, collected and paid the following duties and rates of duty, that is to say:"

* * * * * * *

Act of June 6, 1872, section 2501 of the Revised Statutes:

"There shall be levied, collected and paid on all *goods, wares and merchandise* of the growth or produce of the countries east of the Cape of Good Hope (except wool, raw cotton and raw silk, as reeled from the cocoon, or not further advanced than tram, thrown, or organize,) when imported from places west of the Cape of Good Hope, a duty of ten per centum ad valorem in addition to the duties imposed on any such *article* when imported directly from the place or places of their growth or production."

Act of 1875, February 8, volume 18, page 307:

"That from and after the date of the passage of this act, in lieu of the duties heretofore imposed on the importation of the *goods, wares and merchandise* hereinafter specified, the following rates of duty shall be exacted, namely:

* * * * * * *

"SECTION 2. That from and after the passage of this act, in lieu of the duties now imposed by law on the *merchandise* hereinafter enumerated, imported from foreign countries, there shall be levied, collected, and paid the following duties."

* * * * * *

Supreme Court, U. S.
FILED.
JAN 5 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1896.

The Steam Yacht "CONQUEROR," her tackle, etc., J. SLOAT FASSETT,
Claimant, Appellant,
vs.
FREDERICK W. VANDERBILT,
Respondent.
No. 98.

Brief for Respondent in Answer to Appellant's Brief on Damages.

ELIHU ROOT,
S. B. CLARKE,
BRONSON WINTHROP,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.—1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

The Steam Yacht "CONQUEROR," her tackle, &c.; J. SLOAT FASSETT, Claimant-Appellant, vs. FREDERICK W. VANDERBILT, Respondent.	No. 98.

BRIEF FOR RESPONDENT IN ANSWER TO APPELLANT'S BRIEF ON DAMAGES.

POINT I.

The Attorney-General is manifestly in error in supposing that the certificate of probable cause (under R. S., Sec. 989, Record, p. 120), **prevents any judgment against Fassett for damages and costs.**

A. His own authorities show that, unless there is some controlling statute, damages and costs follow as a natural sequence from such wrongful acts as were charged in this libel.

See, also,

McLean vs. Hagar, 31 Fed. Rep., 602.
Tracy vs. Swartwout, 10 Peters, 80.
Slocum vs. Mayberry, 2 Wheaton, 1.
The Apollon, 9 Wheaton, 362.

B. Section 970, U. S. R. S., manifestly does not apply to this case.

That section relates only to such seizures as are the basis of a prosecution by the United States or by some officer or representative of the United States; *e. g.*, seizures for penalties, forfeiture, confiscation, &c.

See R. S., Secs. 3087, 923, 938, 940.
Also Secs. 564, 570, 734, 909, 920, 3066, 3074, &c., &c.

See, also,
Gelston vs. Hoyt, 3 Wheat., 246.
The Betsey, 4 Cranch., 443.

The words in § 970, "prosecution commenced on account of the seizure of any vessel, &c.," do not refer to a suit brought like this against a Government officer, but to a suit brought by a Government officer on account of and to give effect to a seizure made by him or by some other officer of the Government. This is clear from the fact that it is the prosecutor who, by the terms of the section, is exempted from suit or judgment; that is to say, the prosecution described is a Government prosecution for adjudication upon a seizure; and in such a proceeding the prosecutor—that is, the Government officer who proceeds for the adjudication—and the person who made the seizure upon which that prosecution proceeds, are exempted from liability. This cause in admiralty was not the prosecution contemplated by Section 970. Vanderbilt was not the prosecutor. If he were, nevertheless, judgment has not been rendered for the claimant in this cause. Fassett is the claimant here, and judgment has been rendered against him. The vessel is not to be returned to him in accordance with the proviso of the section.

The section applies only "when * * * judgment is rendered for the *claimant*." By "claimant" clearly is here meant some one whose interest is adverse to the seizure. It certainly does not mean the seizor. Nor does the word "claimant" describe one

who, as plaintiff in an action against a government officer, puts him in the position of defendant.

The same idea is indicated by the phrase "the claimant shall not in such case be entitled to costs." It is also indicated by the proviso "that the vessels, &c., * * * be, after judgment, forthwith returned to such claimant."

The exemption from liability, "nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment *on account of such suit or prosecution*," taken literally, does not exempt from suit or judgment *on account of the seizure*. To make this section effective (beyond exemption of liability for costs of the prosecution) it is necessary to limit it to such seizures as are themselves a part of the prosecution, so that the seizure will be included in the meaning of the words "on account of such suit or prosecution."

That Section 970 is limited to seizures for forfeitures, etc., is rendered more evident by reference to the early statutes containing similar provisions.

Exemption from damages for a seizure with probable cause is first given to a collector in Chapter 5 of the first session of Congress (1 Statutes at Large, p. 29). That act provides that vessels and goods, wares and merchandise may be seized and subjected to forfeiture for violations of certain of its provisions (see Sections 12, 22, 24, 34, 40). It does not give any authority to the collector to take into his custody any goods, wares and merchandise of which entry has not been made within the time limited by law. It is clear, therefore, that this act could apply only to seizures for forfeitures.

This act was repealed by the Act of August 4, 1790 (1 Statutes at Large, p. 145), which was the first act to combine provisions authorizing a collector on the one hand to take into his custody goods, wares and merchandise for unpaid duties, and on the other hand to make seizures for penalties and forfeitures. But the act treated the two proceedings as entirely different

things. Section 33 provided that if at the expiration of fifteen days after the time within which the report of the master of any ship was required to be made, goods unreported should be found on board, they might be taken and placed in the custody of the collector of the district; such goods to be kept for nine months, and at the expiration of that time, if no claim had been made, the goods were to be sold at public auction, and a sum sufficient to pay the duties retained, and the balance paid to the Treasurer of the United States for the use of the owners of the goods on their proving their title to them. Other sections of the act provided for penalties and seizures for forfeiture, and directed collectors to make such seizures both within and without their districts (see Sections 13, 14, 27, 28, 46, 50, etc.). The proceeding, after the penalty or forfeiture had been incurred, and the disposition of the thing seized, were regulated by Sections 67, 68. Section 67 provided: "That all penalties accruing by a breach of this act shall be sued for and recovered with costs of suit in the name of the United States of America, * * * and the collector within whose district the seizure shall be made is hereby authorized and directed to cause suits for the same to be commenced and prosecuted to effect, and to receive, distribute and pay the sum or sums recovered. * * * And that all ships or vessels, goods, wares or merchandise which shall become forfeited by virtue of this act shall be seized, libeled and prosecuted as aforesaid."

The section then contained provisions for advertising notice of the seizure and libel and of the time and place of trial for the appearance of the claimant and for the delivery of the ship or goods to him upon his giving a proper bond. The same section then provided "And when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares or merchandise, judgment shall be given for the claimant or claimants if it shall appear to the Court before whom such prosecution shall be tried, that there

was a reasonable cause of seizure, the same Court shall cause a proper certificate or entry to be made thereof, and in such case the claimant shall not be entitled to costs, nor shall the person who made the seizure or prosecutor be liable to action, suit or judgment on account of such seizure or prosecution. Provided, that the ship or vessel, goods, wares or merchandise be after judgment forthwith returned to said claimant or claimants, his, her or their agents. And provided, that no action or prosecution shall be maintained in any case under this Act, unless the same have been commenced within three years after the penalty of forfeiture was incurred."

Sections 68 and 69 contain provisions for selling at auction vessels and goods seized and forfeited, and for distributing in certain proportions all penalties, fines and forfeitures recovered under the act.

It is plain, therefore, that under this act the taking by the collector into his custody of goods for the nonpayment of duties, and the seizure for forfeiture, are two entirely distinct things, and that the prosecution in which the collector is protected by a certificate of probable cause refers only to the latter.

This act of August 4, 1790, was repealed by the act of March 2, 1799 (1 Stat. at Large, 627), which contained very similar provisions authorizing a collector to take into his custody goods for unpaid duties (§ 56), directing seizures and forfeitures, and the prosecutions to be commenced thereon, and giving protection to a collector for a seizure with probable cause (§ 89).

During this time and up to 1807 other acts authorized seizures of vessels and goods for certain offenses, but in none of these acts was protection given to the officer making the seizure with probable cause.

(See "An Act concerning the registering and recording of ships and vessels," December 31, 1793 (1 Statutes at Large, p. 288, Sec. 4). Also "An Act for registering and clearing vessels, regulating the coasting trade," September 1, 1789 (1 Statutes at Large, p.

55, Sec. 29). Also " An Act in addition to the act for the punishment of certain crimes against the United States," June 5, 1794 (1 Statutes at Large, p. 381). Also " An Act to prohibit the importation of certain goods, wares and merchandise " (April 18, 1806; 2 Statutes at Large, p. 379).

In 1807 the act was passed (II. Statutes at Large, 422), which was subsequently incorporated in Section 970 of the Revised Statutes. This act was a re-enactment of Section 67 of the Act of March 2, 1799, except that it extended its provisions to seizures " made by any collector or other officer *under any act of Congress authorizing such seizure.*" That is under acts *other* than the Act of March 2, 1799. By no construction can the Act of 1807 be held to extend this proctection to actions of a collector authorized by the Act of March 2, 1799, but not protected by it. In other words, if the Act of March 2d authorized a " taking," but gave no protection for a tortious taking, a tortious taking cannot be protected by a general act extending the protection of the Act of March 2, 1799, to seizures under other acts of Congress.

C. The taking and holding of this yacht by the Collector was not such a seizure.

It is alleged in the libel and admitted by Fassett's answer that Fassett acted *solely* upon the claim that the yacht was an article imported into the United States within the fair intendment of the Customs Revenue Laws, and as such liable to duty; that the duties which accrued upon her importation were unpaid, and that he was entitled to take and keep her in safe custody till such debts should be paid or secured in the manner provided by law for articles imported into the United States, and that the yacht was not seized under any claim of authority therefor given by the navigation laws or of any law of the United States providing a penalty or forfeiture.

The laws under which the Collector acted do not contemplate any judicial proceeding whatever. Those laws were summarized by this Court in its opinion on the application for prohibition as follows (*Re* Fassett, 142 U. S., at p. 485):

> "It is provided by Sec. 2785 of the Revised Statutes, that the owner of imported merchandise shall make entry of it with the Collector within a specified time. Section 2963 provides that when merchandise imported into the United States has not been duly entered, it shall be deposited in the public warehouse and there remain. Section 2964 provides that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer to make entry thereof, the merchandise shall be taken possession of by the Collector and deposited in the public stores, there to be kept, subject at all times to the order of the importer, on payment of the proper duties and expenses. Section 2973 provides that if the merchandise shall remain in public store beyond one year, without payment of the duties and charges thereon, it is then to be appraised and sold by the Collector at public auction, and the proceeds, after deducting for storage and other charges and expenses, including duties, are to be paid over to the importer."

D. This Court has already considered the nature of the collector's act in taking possession of this vessel, and has declared it not to be a seizure involving a prosecution.

In disposing of the application for prohibition the Court found it necessary to determine whether Vanderbilt had any other remedy than by this libel, and it said (p. 488):

> "The vessel in this case was not seized for forfeiture. If she had been, that seizure would be one to be followed by a suit for forfeiture instituted by the United States, and thus she would be brought within the jurisdiction of a court of the United States. But she is not to be prosecuted in court by an affirmative proceeding instituted by the United States to recover the duties upon her as an imported article, which

> are claimed by the United States; and thus, the only way in which she can be brought under the jurisdiction of a court of the United States is by the institution of the libel in question."

E. Assuming, however, that Fassett's act was a seizure within the meaning of R. S., § 970, then, if the yacht be not an imported article, the seizure was not "made under any act of Congress authorizing such seizure."

Slocum vs. Maybury, 2 Wheat., 1.

In that case the collector, under a statute authorizing him to seize a vessel had seized the cargo. It was held that his act did not come within the provisions (1 Stats. at Large, 73) which give to District Courts exclusive jurisdiction of "all seizures under laws of import, navigation or trade of the United States."

POINT II.

The damages awarded to Mr. Vanderbilt in the judgment against Mr. Fassett were not excessive.

The record shows the following facts and dates:

Aug. 27, 1891. Collector Fassett takes the Conqueror while at anchor off Stapleton (See Transcript of Record, testimony, p. 36). At that time it was the owner's intention to take the vessel on a trip or cruise, which, owing to the prolonged detention, was abandoned *(ib.*, p. 111*)*.

Sept. 1. Libel filed by F. W. Vanderbilt *(ib.*, p. 2*)*. Process issued returnable September 15th *(ib.*, p. 2*)*.

Sept. 2.	Order to show cause returnable Sept. 8th, why yacht should not be released on bail *(ib.*, pp. 70, 71*)*.
Sept. 15.	Marshal makes his return by which it appears that he had not succeeded in attaching the vessel *(ib.*, p. 8*)*. Motion made that alias process issue. Decision reserved *(ib.*, pp. 76, 77*)*.
Sept. 23.	Order by Judge BENEDICT that alias process issue returnable October 6th, 1891 *(ib.*, p. 8*)*.
Sept. 29.	Yacht is removed by order of the Collector and placed in the Erie Basin in accordance with U. S. R. S., Sec. 2963 *(ib.*, p. 14*)*. Marshal places his deputies on board, though the Collector's representatives still remain *(ib.*, pp. 12–19*)*.
Oct. 6.	Marshal makes return that he has attached the yacht *(Ib.*, p. 9*)*. Marshal's return is traversed *(Ib.*, pp. 12 to 19*)*.
Oct. 8.	It appearing that the Marshal's possession is not undisputed, a third process issues, returnable Oct. 13, 1891 *(Ib.*, p. 20*)*. The Collector's representative is forcibly put ashore *(Ib.*, p. 22*)*.
Oct. 13.	Marshal makes his return to third process *(Ib.*, p. 22*)*. Fassett files his appearance *in personam*, and Fassett as late Collector, and Hendricks, as Collector, claimant on behalf of the United States, file their appearance *(Ib.*, p. 23*)*.
Oct. 13.	Attorney-General moves the Supreme Court for leave to file petition for writ of prohibition to District Judge of Southern District of New York; verified October 2d, 1891.

Oct. 15.	Fassett files his answer and exceptions *in personam*, and Fassett, as late Collector, and Hendricks, as Collector, file their claim, answer and exceptions *(Ib.*, pp. 23, 24, 25*)*.
Oct. 19.	Supreme Court grants Attorney-General's motion and petition is filed *(Ib.*, pp. 65 to 73*)*.
	Rule to show cause granted thereon returnable November 2d *(Ib.*, p. 73*)*.
Jan. 11, 1892.	Supreme Court orders that the petition for the writ of prohibition be denied *(Ib.*, p. 83*)*.
Jan. 29.	Order by Judge BROWN for delivery of yacht to libellant on bail *(Ib.*, p. 94*)*.
Feb. 3.	Yacht released on bail *(Ib.*, pp. 99, 104*)*.

I. The thing which the libellant has lost is the use of the yacht during its detention. The net money value of that use is what the libellant is entitled to recover. This is undoubtedly the rule in ordinary cases of wrongful detention of ships.

The Potomac, 105 U. S., 630.
Williamson vs. Barrett, 13 How., 101.
The Cayuga, 14th Wall., 270.
The James A. Dumont, 34 Fed. Rep., 428.

In the Potomac Mr. Justice GRAY said, page 631 :

> " In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered."

In Williamson vs. Barrett, Mr. Justice NELSON at page 111 said :

> " If it can be shown that the vessel might have been chartered during the period of the repairs, it is impossible to

deny that the owner has not lost in consequence of the damage, the amount which she might have thus earned.

"The market price, therefore, of the hire of the vessel applied as a test of the value of the services will be, if not as certain as in the case where she is under a charter party, at least so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made."

In the case of "The Cayuga" the Supreme Court affirmed the decree of the Court below (see 7 Blatchford, 390), which allowed to the injured party the cost of hiring another ferryboat, though he did not actually hire one, but used a spare boat kept for such emergencies.

The same rule applies to the wrongful detention of a yacht, although her owner did not employ her for profit, but kept her for pleasure only with no intention of letting her for hire.

The Lagonda, 44th Fed. Rep., 367.
The Walter W. Pharo, 1 Lowell, 437.

In "The Lagonda" Judge BENEDICT said:

"It cannot be doubted that demurrage is recoverable for the detention of a yacht caused by a wrongful act. In the case of The Walter W. Pharo, 1 Low., 437, Judge LOWELL gave demurrage for a yacht kept, as this one was, for pleasure, and never let for hire. It was there said: 'It is no concern of the respondents what use the libellant chose to put his vessel to. He had the right to change his mind at any moment.' So here, although it may be that the owner of this yacht at the time she was run into had no intention of chartering her, or employing her for profit, still he was at liberty to charter her at any moment. Death, sickness, loss of fortune, mere whim, might have impelled him to put her to some profitable use. If it appears, therefore, that the yacht could have been chartered by her owner during the time of the detention in question, then any sum he could have realized by chartering her may be recovered by him from the wrongdoer who caused her detention."

See, also, Allen vs. Fox, 51 N. Y., 565.

See, also, opinion of Court of Appeals in Second Circuit in the case of the yacht "Alva," extract from which is appended hereto.

Vanderbilt was also entitled to recover the necessary expenses he incurred while the yacht was detained.

Vantine vs. The Lake, 2 Wall. Jr., 52.
New Haven Steamboat Co. vs. Mayor, 36 Fed. Rep., 716.
The Lively, 1 Gallison, at p. 320.
Nuestra Senora de Regla, 108 U. S., at p. 104.

II. Fassett's wrongful act caused the libellant to lose the use of his yacht from August 27th, 1891, to February 3d, 1892.

A. There is no dispute that in fact the yacht was taken out of the libellant's control on August 27, 1891, and that it was not until February 3d, 1892, that he recovered control of the yacht under the order of the District Court for a release on bail.

There is no pretense that any act or neglect on the part of the libellant contributed in any way to prolong the period of detention.

The evidence is clear that the libellant, with the utmost diligence, prosecuted every remedy known to the law to recover his property or to get it released to him on bail.

He filed his libel on the fourth day after the seizure, and made an immediate application for a release on bail; but, owing, first, to the resistance which the Collector made to the attachment of the yacht under the processes of the District Court, and, second, to the prohibition proceedings in the Supreme Court, it was not until the end of January, 1892, that the libellant obtained a decision for the release of the yacht on bail.

Moreover, this Court stated (*In re* Fassett, 142 U. S., 488) that the institution of this libel was the only way in which the jurisdiction of the U. S. Court could be invoked.

B. The libellant was entitled to his property, and could only recover it by legal proceedings. The necessary detention while these proceedings were in progress, were just as much the direct result of Fassett's wrongful act as the detention while Fassett was in undisputed possession of the boat, and for that detention Fassett is liable.

Talbot vs. Janson, 3 Dall., 133.

This was a cause of possession. The District Court decreed restitution to the libellant, but the claimant appealed and the Circuit Court, in affirming the decree, awarded (p. 135) two guineas per diem for damages. And the Supreme Court, in its decree of affirmance, provided (p. 169) that the libellant should recover, in addition to the decree of the Circuit Court, "demurrage for the detention and delay of the said brigantine 'Vrouw Christina Magdalena' at the rate of nine dollars and thirty-three cents, lawful money of the United States, per diem, to be accounted from the 5th day of November last past (*i. e.*, the date of the Circuit Court decree) till the sixth day of June last, the day of the actual sale of the said brigantine under the interlocutory order of this Court."

A similar rule prevails in replevin cases where damages for detention are assessed up to the time of the verdict.

Sedgwick on Damages, §§ 535, 537.

So when merchandise seized has decreased in value, damages are awarded for the difference up to the day of the restoration, not the day when the Marshal obtains the custody.

Bates vs. Clark, 95 U. S., 204.

The cases cited by the Attorney-General are not analogous.

In Averill vs. Smith, 17 Wall., 82, after the Court had decreed to the claimant restitution of goods seized for forfeiture, and had given to the collector a certifi-

cate of probable cause, the claimant sued the collector for damages in spite of the certificate on the ground that the collector had become a trespasser *ab initio* because he had not returned the goods to the claimant in accordance with the Act of 1807. In using the language quoted in the appellant's brief, the Court was merely arguing that the statute did not intend to throw upon the collector the duty of returning the goods after they had been taken out of his possession and passed into that of the Court—it was the claimant's duty to ask the Court for their restitution.

In prize causes the rule of damages is necessarily different. The public interests require that the Courts should deal leniently with officials who act in difficult emergencies under an honest mistake. As was said by Judge STORY in *The Lively*, 1 Gallison, 315: "So long as public or private ships are armed with the warlike commissions of the government, it is the duty of the courts of justice to grant indulgence to the nature of the service, and not to punish every irregularity with penalties amounting to a prohibition of capture." In the second place captors act for the State, and are bound to surrender their prize to the State, which then adopts their acts and proceeds to adjudicate upon its title to the prize. In ordinary cases, therefore, the liability of the captor who captures with probable cause, is measured by his duty, which is, as stated in The Nuestra Senora de Regla, 108 U. S., at page 103, "to institute judicial proceedings for the condemnation of his prize without unnecessary delay, and if he fails in this the Court may in case of restitution decree demurrage against him as damages." But even in cases of capture where the circumstances have warranted it, Courts have given the claimant demurrage for the detention while the boat was in the custody of the Court pending adjudication.

The Lively, 1 Gall., 315, at p. 328, where Judge STORY decreed "demurrage, including therein wages and

expenses of the ship from the time of capture until she could return to the place of capture."

So, also, for breach of custom house regulations, demurrage has been decreed for detention after the vessel was surrendered.

The Elize, 2 Spinks Adm., 31.
The Ostsee, 2 Spinks Adm., 187.

In *The Elize*, the vessel was captured on Oct. 11th, and libeled on Oct. 20th. Dr. LUSHINGTON decreed demurrage to Nov. 8th, "at the time when the claimant might have had the vessel restored to him."

C. The fact that Fassett, shortly after the taking of the vessel, delivered her over to Hendricks, who succeeded him in the office of the Collector of the Port of New York (if he did, and of that there is no evidence), cannot affect the amount of indemnity to which the libellant is entitled. If the yacht was not an imported article Fassett, as Collector, had no jurisdiction over her. He had no more right to deliver her over to his successor in that office than he had to deliver her over to the Sheriff, or any other person.

Damages are awarded to the libellant to compensate him for his loss, and if that loss was caused by Fassett's original wrongful act Fassett is equally liable, whether he kept the vessel himself, turned her adrift or delivered her to some one else.

III. *The evidence fully sustains the amount of damages assessed by the District Court.*

A. Three expert yacht brokers testified on this subject before the Commissioner.

Their testimony is entirely uncontradicted. No witnesses on this subject were called on behalf of the respondent. It is fair to assume that the District Attorney made vigorous efforts to find testimony that would controvert that of the libellant and that he could not find any.

The testimony of libellant's experts ought therefore to be accepted as conclusive.

One of these witnesses, Manning (the same witness upon whose testimony Judge BENEDICT relied in the case of the yacht "Lagonda" 44 Fed. Rep., 367) testified (see Record, p. 98) that he had personally examined the "Conqueror"; that, in his judgment, the fair and reasonable value of her use from the 27th of August, 1891, to the 3d of February, 1892, was about twenty thousand dollars; that he thought he could have gotten a little more for her at that time; and that the demand for such yachts exceeded the supply.

The other two witnesses put the value at about $100 a day or $3,000 a month, or $15,000 for the period from August 27th, 1891, to February 3d, 1892.

The Commissioner took the minimum amount stated by these witnesses and found the value of the use of the yacht for the period from August 27th to February 3d to be $15,000.

This valuation was for the use of the bare yacht. It was exclusive of all expenses incident to the preservation and running of the yacht. All the witnesses testified that the value of the use of the yacht was from fifteen to twenty thousand dollars over and above all expenses; that a charterer would have paid that amount and would also have borne such expenses as wages and food of crew, running expenses, wharfage, towing, heating, &c.

B. The expenses which the District Court allowed in addition to the amount of $15,000 were made up of wages of officers and men, $3,336.61; provisions and board allowances for officers and men, $1,251.19; medical attendance and medicine for men and washing for men, $56.96; wharfage, $260; towing from Stapleton to Erie Basin, $25; extra expense of heating vessel, $68.40; night watchman, $252.

The fact that these expenses were actually paid by the libellant is testified to by Captain Wood, the master of the yacht.

He also testifies that the expenses were necessary, and that they were, as to all items, kept as low as possible. His testimony is not contradicted by the respondent at any point.

POINT III.

The principle upon which the Commissioner estimated the amount of damages for the loss of the use of the yacht is not open to review on this writ.

A. The evidence as to the value of the use of the vessel was offered without any objection on the part of the District Attorney, and he conceded that to be the true principle of damages in such cases. The only question raised by him was as to the period during which such damages should be recovered.

He stated his claim before the Comissioner as follows:

> "The respondent claims that the only measure of damages in this case should be the reasonable value of the use of the vessel during the time of her detention. So far as the respondent is concerned as Collector of the Port, his detention of the vessel commenced on August 27th, and ended on September 29th, when she was taken from his custody by the Marshal."
>
> Record, p. 106, bottom.

B. The assignment of errors on the appeal to the Circuit Court of Appeals does not assign as error the principle upon which damages were estimated, but only the allowance of any damages, interests and costs.

See Record, p. 124–5.

ELIHU ROOT,
S. B. CLARKE,
BRONSON WINTHROP,
Of Counsel.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

OCTOBER TERM. 1895.

THE H. F. DIMOCK.

No. 148.

METROPOLITAN STEAMSHIP COMPANY,

PETITIONERS FOR LIMITATION OF LIABILITY AS OWNERS OF STEAMSHIP H. F. DIMOCK.

v.

WILLIAM K. VANDERBILT ET AL.,

DAMAGE CLAIMANTS.

No. 149.

WILLIAM K. VANDERBILT,

DAMAGE CLAIMANT,

v.

METROPOLITAN STEAMSHIP COMPANY,

PETITIONERS.

APPEALS FROM THE DISERICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BEFORE COLT, PUTNAM AND WEBB, JJ.

Extract from Opinion of the Court.

SEPTEMBER 16, 1896.

PUTNAM, J.: The general facts involved in these appeals were stated by the learned Judge of the District Court as follows:

* * * * * *

The proceedings and evidence about the value of the "Alva" were as follows: She was a steam pleasure yacht, constructed for her owner, William K. Vanderbilt, in 1886 and 1887, by the Harlan & Hollingsworth Company, builders of high reputation, at a cost of from $380,000 to $400,000. She was, therefore, about five years old, and was a comparatively modern vessel. Her gross tonnage was eleven hundred and fifty-one and twenty-four one-hundredths tons. She was of thirty-four hundred horse power, and her speed was said to be from eleven to thirteen knots. She was built by day labor, with the addition of commissions paid her constructors, making her, of course, an especially costly vessel.

There is, however, no evidence that full value was not obtained for the money paid out in her construction; so the method by day labor affords no presumption, except in favor of thoroughness and fidelity of work. It is true that Lord, a steamship broker, testifies that, "at the time the 'Alva' was built, a vessel of her description, equally good in every respect, could have been built for at least fifteen per cent.—fifteen to twenty per cent.—less than the price paid for her;" but he shows no knowledge of the "Alva" sufficient to base any such opinion on with positiveness, and the diminution he makes in this respect is inconsequential in view of the very great reduction made by the District Court.

Lord also testifies that her engines were of an obsolete style and her coal consumption large, and that these facts would give a large depreciation in her value.

He says, in reference to these particulars, that she had not sufficient speed to make her a fast boat, and that her large consumption of coal would take her out of the class of auxiliary steam yachts, "so that she could neither be called an auxiliary yacht or a speedy one." He also adds that he thinks "that probably it might have been advisable to have taken those engines and boilers out, and replaced them with modern engines and boilers." All this, however, must be taken in a qualified sense, and, moreover, it is evidently given without thorough knowledge of the "Alva" or her construction, and is partly based on facts which are assumed in the examination of the witnesses and not proven in the record. It is improbable that constructors of the reputation of the builders of this vessel should, under the circumstances, have launched a yacht which would have grown obsolete in five years, or so soon proven insufficient, or have depreciated for practical use except in accordance with the ordinary and inevitable progress of marine architecture. The reduction in value made by the District Court of fully one-half of the cost of this vessel affords ample allowance to cover all the suggestions made by the witness Lord, giving them the broadest effect which practical sense will permit us to do.

The steam yacht "Atalanta," about three years older than the "Alva," of somewhat less tonnage, of superior speed, and, as one witness says, for the general market almost equal to the "Alva," if not quite, was on sale at a time not named, for about two years, at one hundred and fifty thousand dollars, and not sold.

Other evidence offered by the "Dimock" consists of the opinions of Hughes and Borrows, and also of Lord. Neither of them had any personal knowledge of the "Alva" except of the most general character. Hughes is a yacht broker. He does not attempt to give the market value of the "Alva"; but, on the other hand, he says that there is no market for vessels like her. He also says that the highest

price ever paid for a yacht was one hundred and five thousand dollars, which was on a purchare of the "Sagamore," being more than she in fact cost. Borrows is a general steamship broker, and he values the "Alva" at about one hundred and thirty thousand dollars. Lord, of whom we have already spoken, values her at from eighty thousand to ninety thousand dollars. It is apparent, however, that the evidence of Borrows and Lord was controlled by their knowledge of sales of merchant steamers, which, at the times in question here—especially if they were of a somewhat obsolete type—were generally sold for very moderate sums.

Mr. Vanderbilt testifies that, at some little time before the collision, he had been asked what he would take for the yacht by several parties, and that he replied three hundred thousand dollars, but that he stated to one friend that he would take, if he could get an offer in cash, two hundred and seventy-five thousand dollars. He adds that that was the lowest which he would have taken. While these facts are in the record, of course they are not legitimate proof. Mr. Vanderbilt also testifies that the "Alva" had not suffered more than the ordinary and usual depreciation, and that she had been thoroughly kept up, and that a great deal had been spent on her in repairs, in keeping her in a thoroughly first-class condition.

The "Dimock" practically admits a value of one hundred and twenty-five thousand dollars.

This is substantially all the evidence there is in the record, and, of course, is far from satisfactory; and, from the very nature of the case, it would seem that nothing except proof of a meagre and general character could be expected.

The matter of values was passed on by a commissioner appointed by the District Court, who seems to have given it very careful attention, and who fixed that of the "Alva" at $190,000, not including her boats, which were saved. To this was added $5,000 for the personal effects of the

owner; and there was deducted, as the value of the wreckage, $3,500, leaving net $191,500. The District Court accepted this valuation, the learned Judge, however, remarking that he did not agree with the Commissioner in his rule for assessing her value "at what she was worth to the owner." He adopted the rule of "her market value just before the loss," but he added that, "even under the latter rule, the estimate of the Commissioner was as near her value as it was possible to arrive."

It is quite probable, looking at the whole report of the Commissioner, that, notwithstanding this peculiar expression, he had substantially the same view of the law as that stated by the District Court, and it is also quite probable that the District Court, notwithstanding it uses the expression "market value," intended rather to distinguish against what it cited from the Commissioner, than against the view of the law which we think we ought to adopt. As both this Court, the learned Judge of the District Court and the Commissioner reach the same result, it may not seem necessary to dwell on the rules of law which control us; yet it is prudent to do so.

What was said by the learned Judge of the District Court leads up, first of all, to the distinction which marks the limited class with regard to which the rule of damages is expressed by the words *pretium affectionis*. This rule is defined by a reliable legal lexicographer as follows: "An imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it." (Bouvier's Law Dictionary). The testimony of Mr. Vanderbilt, which we have observed was not legitimate proof, leads up to this rule of valuation; and the same may be said as to the expression of the Commissioner, which the District Court disapproved. The elements which enter into such a valuation are suggested in *Green vs. Boston and Lowell Railroad Company*, 128

Mass., 221, 226, 227, an action for the loss of a portrait of the plaintiff's father. The Court said :

> "The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."

The Court added that "the testimony of the plaintiff that he had no other portrait of his father would bear upon the question of its actual value to him, and was competent."

We need not dwell further on the illustration of this class. It is plain that *pretium affectionis* has no relation to a vessel of the character of the "Alva," and that, therefore, the expression cited from the Commissioner and the evidence of Mr. Vanderbilt, to which we have referred, were irrelevant.

It does not, however, follow that the proper rule of damages here is simply the market value of the "Alva" in the usual sense of those words ; because the other great division, as distinguished from the class to which *pretium affectionis* applies, includes everything as to which the basis of valuation is that of property as property, and with the rest a vast number of matters with reference to which the rule of mere market value would be unjust or inapplicable. Taking this for the second great class, it is plainly separable into a number of subdivisions. Among them are, first, cases where the rule is strictly the cost of replacing, illustrated by *Topsham vs. Lisbon*, 65 Me., 449, 464, an action for the destruction of the abutment of a bridge, built by the town of Topsham, and which it was bound by law to renew. The second embraces cases where the thing injured or destroyed was constructed for a special purpose, and has pecuniary value for that purpose, and for no other. In this class will be found stereotype plates, as explained in *Stickney vs. Allen*, 10 Gray, 352, 356, the value of which is ordinarily to be determined according to the

exclusive use to which the plates are to be put by the owner of them, thus bringing into estimate, as a direct element therein, the cost of replacing them. The same applies to a dredge constructed for special work, and in use for that work, or liable soon to be in use for it, as explained by the Supreme Court in *The Granite State*, 3 Wall., 310, 314. Of course, this class embraces such special articles so long only as they are in active use, or liable to be called into active use, because the moment they become obsolete they cannot ordinarily be valued, except for the mere market worth of the materials or parts into which they may be divided.

The third subdivision, which is the great one, and the one ordinarily spoken of by the courts, covers those articles which have a recognized market value, and as to which the rule of damages is rigidly held to be limited according to such value. With reference to this great class, the cost is no proper element; and, if admitted at all in evidence, it is admitted, not as bearing directly on the value of the article, but only indirectly, when the market is limited, for the purpose of leading up to a determination of what the market value is. But with reference to all the other subdivisions already described, the cost of construction, or of reconstruction, is admittedly an important element for direct consideration in determining the amount of compensation to be awarded.

The fourth and last subdivision is so far akin to the third that it concerns only the present property value; so that the cost of producing or reproducing, although sometimes an important indirect element, is not a direct one in computation, as it is in the first and second subdivisions. In *Stickney vs. Allen*, already referred to, at page 356, the Court said as follows:

> "The defendant insists that the market value was the true rule of damages. And this is doubtless the general rule in trover. But this rule presupposes the conversion of marketable property."

It cannot be questioned that the yacht in controversy here was "marketable property" in the general sense of the term; so that this precise expression, apparently used somewhat loosely, does not reach the case we have to deal with. We find the rule, however, repeated elsewhere with exactness. In *Green vs. Boston and Lowell Railroad Company*, at page 226, the Supreme Court of Massachusetts uses the same expression over again, but in such connection that it is evident it had reference, not merely to property not marketable, but to property which has no market value in the proper sense of those words. The Court there said:

> "The general rule of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct the jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot, with any propriety, be said to have any market value."

In Williams & Bruce's Admiralty Practice, 2d ed., it was said, at page 97, with reference to a ship totally lost, as follows:

> "In ordinary cases the market value of the ship immediately before her loss may be regarded as a fair measure of her value. But in the case of a ship adapted only for special purposes, and of such an exceptional character as to be in fact unmarketable, some other criterion must be adopted. In these cases the Court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate, and the original price of the ship, its condition at the time of the loss, and the sum for which the plaintiff could have got such another ship built, may be very important matters in the calculation."

But the Supreme Court, in *The Granite State*, already referred to, at page 314, although speaking

more particularly of the dredge in controversy in that case, very clearly made the distinction to which this fourth subdivision relates, as follows:

> "There cannot be an established market value for barges, boats and other articles of that description, as in cases of grain, cotton or stock."

While the value of the "Alva" is not to be determined, as are the limited range of articles in the first class we have named, by the rule of *pretium affectionis*, and while she is not entitled to the special rules relating to articles in the first and second subdivisions of the second class, where the cost of reproducing is a direct element, and although it cannot be said she is not marketable in every sense of the term, and although we can look only at her property value in the ordinary meaning of that expression, yet evidently a yacht of her size and construction and fitting has no market value in the sense in which those words are used with reference to the articles of the third subdivision, that is to say: It is apparent that she does not fall within the class of articles which are sold from day to day, so that frequent current market transactions will enable the owner, if he desires to sell, to obtain, within a reasonable time, a fair value, or, if he is compelled to replace, to replace at a like fair value. She belongs rather to that great mass of property of which dwellings of more than mere moderate cost, erected away from the active centres of thickly settled cities, and much other property acquired for domestic or personal uses, are fair representatives. To endeavor to determine the value of such property as against tort feasors, or in any case where restitution is to be made, by the mere market value in the ordinary sense of the term, would work great injustice, and would attempt to maintain a theoretical rule which could not be practically enforced. With reference to all the same, the extract we have made from Williams & Bruce's Admiralty Practice applies—namely, that in such cases

"the Court will endeavor to arrive at the real extent of the loss sustained by calling to its aid every circumstance which may assist it to form a correct estimate, and the original price of the ship, its condition at the time of loss, and the sum for which the plaintiff could have got such another ship built, may be very important matters in the calculation."

By this it is not intended to go beyond what we have said. It is still the pecuniary interest which is to be valued, and not merely the minimum sum at which the owner of property of this class might, for special reasons, be willing to dispose of it. Some of the Courts have said that in all such cases no defined rule could be given, but that the jury, if the jury is to assess the damages, must determine for itself within reasonable limits, and subject to the general observations which we have named. We think it safe, however, to say that, with reference to property of this class—and in this case the "Alva" herself—one inquiry of practical value would be, what amount any person of sufficient means, desiring to acquire a yacht of her size and character, or any other property of a special kind, might reasonably be expected to be willing to pay for the same rather than incur the cost of a new structure, considering, nevertheless, the inducements to secure the new by reason of the probable improvements and the other advantages which the new offers. In working on that line it is evident that all the elements stated in the extract we have made from Williams & Bruce's Admiralty Practice come in play, although none of them would be controlling, and each of them might depart very widely from the measure of valuation to be finally adopted. In cases of insurance the rule is said to be one of indemnity, and undoubtedly, with reference to insurance on buildings of the class which we have described, the market value of the property burned seldom fixes a fair rule of adjustment. In *Washington Mills Manuf. Co. vs. Weymouth Ins. Co.*, 135 Mass., 503, 506, the Court said as follows:

> "So, the market value of the property burned is not always a fair rule of adjustment. The contract of the insurer is not that, if the property is burned, he will pay its market value; but that he will indemnify the assured—that is, save him harmless, or put him in as good a condition, so far as practicable, as he would have been in if no fire had occurred."

It is true that in insurance the rule is one of indemnity; but it cannot be said to be less in cases of collision. The rule here is admittedly that of *restitutio in integrum*; and, indeed, so liberal a restitution is made that the admiralty gives the owner of the vessel injured benefits given nowhere else, as, for example, the value of pending freight, and, what is of more importance, in case of partial injury the cost of repairs without any deduction on account of new for old. Marsden's Collisions at Sea, 3d Ed., at page 111, contains a full statement of this rule.

It is very apparent that, in the case at bar, the owner of the "Alva" would fall far short from being put "in the same condition as if the injury had not been suffered," if the narrow rule of market value was adopted. We, therefore, think that she falls within the fourth subdivision, and that all the elements to which we have referred as admissible concerning the valuation of articles belonging to that subdivision are to be considered. In view of this conclusion, we are unable to hold that either the learned Judge of the District Court or the Commissioner should have gone further than they did, which was to reduce by one-half of her original cost the value of this vessel, only five years old, kept, as the record shows, in the best condition of repair. We think that such a reduction makes ample allowance for every consideration which could be urged against her, including all those suggested by the testimony of Mr. Lord. We are certainly unable to revise with any satisfaction to ourselves the value thus put on her in the District Court.

Argued Mch. 1/97 166-136

Supreme Court of the United States.

No. 15 Original.

Ex-parte

GUSTAVE ALIX, MASTER OF BELGIAN STEAMSHIP "CAUCASE."

Suggestion for Writ of Prohibition

to be directed to the Judge of the District Court of the United States in and for the District of New Jersey.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Counsel.

348–349 Bourse Building,
Philadelphia.

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APPENDIX.

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IN THE

Supreme Court of the United States.

Ex-parte
GUSTAVE ALIX, Master of
Belgian steamship "CAUCASE."

No. .

ORIGINAL.

Suggestion for a Writ of Prohibition to be Directed to the Judge of the District Court of the United States, for the District of New Jersey.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition and suggestion of Gustave Alix against the District Court of the United States, for the District of New Jersey, sitting in admiralty, respectfully represents:

I.

(*a*) That on the twenty-second day of October, 1894, as Master of the Belgian steamship "Caucase," he filed his libel in the District Court of the United States, for the District of Delaware, sitting in admiralty, against the British steamship "Allegheny" to recover damages for the injuries sustained by the said steamship "Caucase," in a collision between the said vessels, near Ship John Light, in the Delaware Bay, on October 1, 1894, and that thereupon a writ of attachment was duly issued out of said Court in accordance with the practice in admiralty, to which the Marshal made return as follows:

"After diligent search I hereby certify that I find the within mentioned vessel within my district, in a wrecked condition, said vessel being sunk below the level of the water in the Delaware Bay, near Ship John Light, and I have been unable to attach the same."

Dated November 6, 1894.

So answers.

HEWSON E. LANNAN,

U. S. Marshal.

(*b*) On November 24, 1894, an *alias* writ of attachment was duly issued out of the said District Court of the United States, for the District of Delaware in said action against the said steamship "Allegheny," and in pursuance thereof she was duly attached by the Marshal on December 2, 1894, and he has so made return to said writ.

(*c*) Said steamship "Allegheny" was sunk by the collision between the two vessels and was afterwards raised by salvors. After being raised it was found that there was no wharf or place within the territorial limits of the District of Delaware, where the said steamship "Allegheny" could be properly cared for, protected and repaired, and it was therefore desired by the salvors to remove her to Philadelphia, within the Eastern District of Pennsylvania, so that she might there receive the proper protection, attention and repairs. Said steamship "Allegheny" being then in the custody of the Marshal of the District of Delaware under the *alias* attachment in the suit of your petitioner, the latter refused to permit the said steamship to be removed from the territorial limits of the District of Delaware, except in the custody of the Marshal of the said District Court, under the attachment in his suit against her, and on further condition that the said steamship should remain in the custody of the said Marshal, under said attachment, until released therefrom by order or decree of said District Court for the District of Delaware.

(*d*) That thereupon an agreement was entered into by the owners of the steamship "Allegheny," acting by their proctors, by the petitioner, acting by his proctors, and by the salvors, wherein it was agreed that the said steamship "Allegheny" should be brought to Philadelphia, for the purpose of being repaired, in the charge and legal custody of the Marshal of the District Court of the United States for the District of Delaware under said *alias* attachment. By said agreement the parties expressed their intention "That the jurisdiction shall remain as though said steamship had not been removed from the State of Delaware" and also "until further action or agreement the 'Allegheny' to remain in the legal custody of the Marshal of the District of Delaware." A copy of said agreement is attached hereto and is made part hereof.

(*e*) That upon the execution of said agreement, your petitioner by his proctors, directed the said Marshal of the District Court of the United States for the District of Delaware to permit said steamship "Allegheny" to be removed from the said District of Delaware to Philadelphia, in his custody under said attachment, and thereafter said steamship was taken to Philadelphia in his charge and custody on or about the ninth day of March, A. D. 1895.

(*f*) That under and by virtue of a further agreement of the parties endorsed on the original agreement hereinbefore referred to and which is a part hereof, the said steamship "Allegheny" was permitted to be removed, still in the legal custody of the Marshal of the District of Delaware, to a point in the Delaware River, off Cooper's Point, Camden, New Jersey, where one John L. Mills undertook and proceeded to do certain work upon her, in pursuance of a contract made by him with the salvors, who were parties to the agreement above referred to and attached hereto, providing for the removal of the said steamship from the District of Delaware, in the custody of the Marshal thereof.

(*g*) That at the time the said steamship "Allegheny" was taken from Philadelphia to the point in the Delaware River,

off Cooper's Point, Camden, New Jersey, notice was given by the Marshal of the District Court of the United States for the District of Delaware, to J. Willard Morgan, Esq., United States Commissioner, 206 Market Street, Camden, New Jersey, to George Pfeiffer, Esq., United States Marshal for the District of New Jersey, to the Sheriff of the County of Camden, New Jersey, and to the attorney who was acting for said John L. Mills in the matter, that the said vessel was in his custody and charge under the attachment issued out of the said District Court of the United States for the District of Delaware upon the libel filed by your petitioner therein. Copies of said notice are hereto attached and made part hereof.

(*h*) That prior to the time said steamship "Allegheny" was taken to the place in the Delaware River off Cooper's Point, Camden, as aforesaid, and prior to any work being done upon her by the said John L. Mills, he admitted and acknowledged by his attorney acting for him in the matter, that the said steamship was in the custody and possession of the Marshal of the District Court of the United States for the District of Delaware under the attachment in suit of your petitioner, aud said Mills desired your petitioner to agree that he, the said Mills, should have a lien upon the said steamship "Allegheny" for any work which he might do upon her, to which, however, your petitioner refused to agree.

(*i*) That the proceedings commenced by your petitioner on behalf of the steamship "Caucase," in the District Court of the United States for the District of Delaware, are still pending, and the said steamship "Allegheny" has never been released nor discharged in any way from said attachment therein, and your petitioner is advised and believes, and therefore avers that the Marshal of the District Court of the United States for the District of Delaware has never relinquished his custody or possession of the said steamship under said attachment, but has retained the same until the present time.

(*f*) The proceedings of said District Court of the United States for the District of Delaware, in the suit of your petitioner, are fully set forth in the copies of various papers filed therein, which are hereto attached and made part hereof.

II.

(*a*) That on or about the fourteenth day of September, A. D. 1896, the said John L. Mills filed his libel in the District Court of the United States for the District of New Jersey, sitting in admiralty, against the said British steamship "Allegheny" to recover for certain work done by him upon the steamship "Allegheny" while she was lying in the Delaware River off Cooper's Point, New Jersey, in the custody of the Marshal of the District Court of the United States for the District of Delaware, under attachment in the suit of your petitioner therein, as hereinbefore set forth.

(*b*) That thereupon process of attachment was issued out of the said District Court for the District of New Jersey upon said libel. At the time said writ was issued said steamship "Allegheny" was in the custody and possession of the Marshal of said District Court of Delaware, under the attachment in the suit of your petitioner therein, and the said Marshal or his deputy was ejected therefrom by the Marshal of the District of New Jersey, or by his deputies, with force and with violence, as your petitioner is informed and believes.

(*c*) That on December 15, 1894, upon motion of proctor for John L. Mills, order was made by said Court directing said steamship "Allegheny" to be sold as perishable by the Marshal of the said Court upon six days' notice of sale.

(*d*) That no notice of said application for the sale of said steamship was given to your petitioner or to his proctors nor to the owners or underwriters of said schooner, to the salvors or any person interested therein, as your petitioner is informed and believes and therefore avers, although the said

off Cooper's Point, Camden, New Jersey, notice was given by the Marshal of the District Court of the United States for the District of Delaware, to J. Willard Morgan, Esq., United States Commissioner, 206 Market Street, Camden, New Jersey, to George Pfeiffer, Esq., United States Marshal for the District of New Jersey, to the Sheriff of the County of Camden, New Jersey, and to the attorney who was acting for said John L. Mills in the matter, that the said vessel was in his custody and charge under the attachment issued out of the said District Court of the United States for the District of Delaware upon the libel filed by your petitioner therein. Copies of said notice are hereto attached and made part hereof.

(*h*) That prior to the time said steamship "Allegheny" was taken to the place in the Delaware River off Cooper's Point, Camden, as aforesaid, and prior to any work being done upon her by the said John L. Mills, he admitted and acknowledged by his attorney acting for him in the matter, that the said steamship was in the custody and possession of the Marshal of the District Court of the United States for the District of Delaware under the attachment in suit of your petitioner, aud said Mills desired your petitioner to agree that he, the said Mills, should have a lien upon the said steamship "Allegheny" for any work which he might do upon her, to which, however, your petitioner refused to agree.

(*i*) That the proceedings commenced by your petitioner on behalf of the steamship "Caucase," in the District Court of the United States for the District of Delaware, are still pending, and the said steamship "Allegheny" has never been released nor discharged in any way from said attachment therein, and your petitioner is advised and believes, and therefore avers that the Marshal of the District Court of the United States for the District of Delaware has never relinquished his custody or possession of the said steamship under said attachment, but has retained the same until the present time.

(*f*) The proceedings of said District Court of the United States for the District of Delaware, in the suit of your petitioner, are fully set forth in the copies of various papers filed therein, which are hereto attached and made part hereof.

II.

(*a*) That on or about the fourteenth day of September, A. D. 1896, the said John L. Mills filed his libel in the District Court of the United States for the District of New Jersey, sitting in admiralty, against the said British steamship "Allegheny" to recover for certain work done by him upon the steamship "Allegheny" while she was lying in the Delaware River off Cooper's Point, New Jersey, in the custody of the Marshal of the District Court of the United States for the District of Delaware, under attachment in the suit of your petitioner therein, as hereinbefore set forth.

(*b*) That thereupon process of attachment was issued out of the said District Court for the District of New Jersey upon said libel. At the time said writ was issued said steamship "Allegheny" was in the custody and possession of the Marshal of said District Court of Delaware, under the attachment in the suit of your petitioner therein, and the said Marshal or his deputy was ejected therefrom by the Marshal of the District of New Jersey, or by his deputies, with force and with violence, as your petitioner is informed and believes.

(*c*) That on December 15, 1894, upon motion of proctor for John L. Mills, order was made by said Court directing said steamship "Allegheny" to be sold as perishable by the Marshal of the said Court upon six days' notice of sale.

(*d*) That no notice of said application for the sale of said steamship was given to your petitioner or to his proctors nor to the owners or underwriters of said schooner, to the salvors or any person interested therein, as your petitioner is informed and believes and therefore avers, although the said

John L. Mills was fully aware of said attachment in the suit of your petitioner in the District of Delaware, having been notified thereof as hereinbefore set forth.

(*e*) That the first knowledge of said motion for sale of said steamship or the order therefor on the part of your petitioner or his counsel, was obtained from the newspapers published in Philadelphia on December 16, 1894.

(*f*) That on December 18, 1896, that being the first session of said Court, your petitioner appeared therein and denying the jurisdiction of the Court of the premises, moved for the vacation of said order of sale on the ground that the said Court had no jurisdiction of said steamship "Allegheny," and said motion was held open for further argument, at Philadelphia, on the next day, December 19, 1896, before the Honorable Andrew Kirkpatrick, Judge of said District Court for the District of New Jersey, and the Honorable Leonard E. Wales, Judge of said District Court for the District of Delaware.

(*g*) That on said day the question of the jurisdiction of said Courts over the steamship was fully argued before said judges and decision was reserved.

(*h*) Subsequently, on December 21, 1896, said motion for vacation of order of sale in said District Court of New Jersey was dismissed. Your petitioner is advised and therefore avers that said motion was dismissed without any decision upon the question of the jurisdiction of said District Court of New Jersey, the determination of that question being, as your petitioner is advised, deferred until a subsequent time.

(*i*) That said sale thereupon proceeded and said steamship was sold thereat to John L. Mills, the libellant in said proceeding. Your petitioner filed exceptions to said sale, and objected to the confirmation thereof on the ground of a lack of jurisdiction of said steamship by said Court. Said exceptions were overruled by said Court and said sale was confirmed on December 30, 1896.

(*j*) That your petitioner has filed his petition in suggestion in said District Court for the District of New Jersey, setting forth the facts herein set forth and suggesting that said libel filed by said John L. Mills be dismissed, because said Court had no jurisdiction over said steamship, but said Court has contained to assert and exercise jurisdiction notwithstanding the same.

(*k*) All of said proceedings in said District Court of the District of New Jersey, appear by the records of said Court.

III.

(*a*) Your petitioner is advised by counsel, and therefore avers that at the time of the filing of said libel by John L. Mills, in the District Court of the United States for the District of New Jersey, the said steamship "Allegheny" was in the legal custody and possession of the said District Court of the United States for the District of Delaware, and that the District Court of the United States for the District of New Jersey did not at the time have jurisdiction of the said steamship "Allegheny" and by reason thereof, all proceedings under the said libel and attachment in the District Court for the District of New Jersey are invalid.

(*b*) Your petitioner further suggests that by reason of the said conflict of jurisdiction of said District Courts for the Districts of Delaware and New Jersey, his rights are imperilled and that until the question of jurisdiction is determined his rights in the matter will be in peril and jeopardy.

Wherefore the said Gustave Alix prays remedy by a writ of prohibition to be issued out of this Honorable Court to the Judge of the District Court of the United States for the District of New Jersey, to be directed, to prohibit him enforcing him from enforcing any of the said orders or decrees by him heretofore made and to further prohibit him, the said

Judge, from making any further orders or decrees in the said proceedings and generally from the further exercise of jurisdiction in said cause, or enforcing any order or decree made under color thereof.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Of Counsel.

STATE OF PENNSYLVANIA, } ss.
COUNTY OF PHILADELPHIA, }

HORACE L. CHEYNEY, being duly affirmed, says that he is counsel for the petitioner and that the statements contained in the foregoing petition are true to the best of his knowledge, information and belief.

Affirmed and subscribed before me this 9th day of January, A. D. 1897.

APPENDIX.

Proceedings in District Court of Delaware.

GUSTAVE ALIX, Master of the Belgian Steamship "CAUCASE," etc.	No. 508.
vs.	IN ADMIRALTY.
The BRITISH STEAMPHIP "ALLEGHENY," her boilers, engines, etc.	Libel *sur* Collision.

BE IT REMEMBERED, That heretofore, to wit: on the twenty-second day of October, A. D. eighteen hundred and ninety-four, came the said libellant, by his Proctors, Horace L. Cheyney, Esq., and John F. Lewis, Esq., and filed his libel in the above cause, which libel is as follows:

To the Honorable Leonard E. Wales, Judge of the District Court of the United States for the District of Delaware.

THE LIBEL AND COMPLAINT of Gustave Alix, master of the Belgian steamship "Caucase," on behalf of the owners of the said steamship, against the British steamship "Allegheny," whereof Tucker now is or late was master, her boilers, engines and machinery, tackle, apparel and furniture, in a case of collision, civil and maritime, alleges as follows:

I. That the said steamship "Caucase" is a Belgian bulk oil steamship of 1666 tons burden, hailing from Antwerp, and at the time hereinafter mentioned was well and sufficiently manned and equipped, and was tight, staunch and strong, and in every way fitted for the voyage upon which she was bound.

The steamship "Allegheny" is a British steamship hailing from London, and is engaged in carrying petroleum in bulk, and is 2914 gross tonnage.

II. Upon the morning of Monday, October 1, 1894, while it was yet dark, the said steamship "Caucase" was proceeding up the Delaware Bay bound for the port of Philadelphia, to load a cargo of oil at Point Breeze, for a voyage to the port of Calais, France, and the said steamship "Allegheny" was bound down Delaware Bay loaded with a cargo of oil in bulk and in barrels, and bound for Stavenger, Norway.

At about 4.30 o'clock A. M. the said steamship "Caucase," bound on the voyage aforesaid, was proceeding on a course about northwest by north, and at the time was about three miles below Ship John Light. Her master was upon the bridge together with the second officer, and a pilot duly licensed under the laws of the State of Pennsylvania. A competent and skillful seaman was also upon the bridge at her wheel, and a competent and skillful seaman was forward upon the lookout, and others were upon watch on deck assisting in her navigation. While the "Caucase" was thus proceeding upon her course of northwest by north and slightly to the eastward of mid-channel, the steamship "Allegheny" a considerable distance, up the bay, was proceeding down upon a course to the eastward of the course and position of the "Caucase." A small schooner was between the approaching steamers, showing a red light to the "Caucase," and in order to clear her the helm of the "Caucase" was ported so she might properly and safely pass under the schooner's stern instead of across her bow, and while the "Caucase" was thus passing around the schooner's stern the "Allegheny" blew a signal indicating that the approaching steamers should pass green to green. The "Caucase" immediately responded with a signal of two whistles and starboarded her helm and at once proceeded to keep off in accordance with the "Allegheny's" signal and with her own response and held that course steadily, but those in charge of the "Allegheny," for some reason unknown to the libellant, but probably because they failed to see the schooner aforesaid or concluded that it would have been the more usual and customary course for them to have blown a signal of one whistle and passed the "Caucase" red

to red, made the mistake often made by navigators, who imagine approaching vessels ought always to pass to port, disregarded their former signal of two blasts and blew a signal of one blast, and porting the "Allegheny's" helm swung her to starboard and proceeded on a course directly across the bow of the "Caucase," and into a position of imminent danger. As soon as this change of signals and course was perceived by the master and pilot of the "Caucase," everything possible was done to lighten the force of the unavoidable impending collision. The engines of the "Caucase" were stopped and at once put full speed astern, but the "Allegheny" had already proceeded across the bows of the "Caucase" almost at an angle, and though the pilot sprang to the helm himself and put it hard aport to assist the reversing-screw in swinging the "Caucase's" bow to starboard and thereby easing the blow, yet the "Allegheny" was struck upon the port side or quarter by the former's bow, right abaft of the smoke-stack, causing considerable damage to the "Allegheny" and to the "Caucase" herself, and in a comparatively short time the "Allegheny" sank in consequence of the blow that she received, and now lies partly submerged and within the jurisdiction of this Honorable Court.

III. That said collision was due to no fault or negligenec whatever of those in charge of the "Caucase," but is solely attributable to the negligence and misconduct of those in charge of the "Allegheny," and especially in the following particulars:

(*a*) In not proceeding upon the course upon which she was originally when upon the starboard bow of the "Caucase."

(*b*) In not proceeding upon the course she took after blowing two whistles to the "Caucase," and receiving an acceptance of the said signal and an answer thereto.

(*c*) In blowing a signal of two whistles to the "Caucase," and subsequently blowing a signal of one whistle, and realtering her course in accordance with the latter.

(*d*) In proceeding upon a course across that of the "Caucase," and in dangerous proximity to her.

(*e*) In failing to blow a signal of one whistle in the first instance if she desired to pass the "Caucase" red to red.

(*f*) In failing to stop and reverse.

(*g*) In not having a good and sufficient lookout, and in violating the rules of the road.

IV. The damages sustained by the "Caucase" are serious in character and will amount to about the sum of twelve thousand dollars, and in order to repair and refit herself for sea, she has been detained from the time of the said collision (October 1st) until the present time, and will be detained four or five days further, and is entitled in addition to the small damage to recover compensation in the nature of demurrage during her detention; and libellant alleges that the usual and proper rate for steamers of her size and class is the sum of three hundred dollars a day, which will make a total amount for demurrage for the twenty-two days of her present detention, and for the possible four or five days additional detention of $8100, making the total claim for damage and demurrage the sum of $20,100.

V. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore the libellant prays that process of attachment in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said steamship "Allegheny," her tackle, apparel and furniture, engines, boilers and machinery, and that her Master and all other persons having or pretending to have any right, title or interest therein, may be cited to appear and answer all and singular the matters aforesaid; and that this Honorable Court will be pleased to pronounce for the

damages aforesaid and condemn the said steamship to be sold to pay the same, and grant the libellant such other and further relief as in law and justice he may be entitled to receive.

(Sgd) GUSTAVE ALIX,
Master of the Steamship "Caucase."

JOHN F. LEWIS,
H. L. CHEYNEY,
His Proctors.

EASTERN DISTRICT OF PENNSYLVANIA, *ss.*

WILLIAM H. LA BOYTEAUX, being duly sworn according to law, deposes and says that he is the attorney specially instructed as to the facts of this case, and that the facts set forth in the foregoing libel are true to the best of his knowledge and belief.

Sworn and subscribed before me this 22d day of October A. D., 1894. } (Sgd) W. H. LA BOYTEAUX.

(Sgd) JOHN F. LEWIS,
[SEAL] *U. S. Commissioner.*

Process of Attachment and Monition.

UNITED STATES OF AMERICA, DISTRICT OF DELAWARE. } *ss.*

The President of the United States of America. To the United States Marshal for said District, GREETING:

YOU ARE COMMANDED, that you attach the British steamship "Allegheny," her boilers, engines, machinery, tackle, apparel and furniture, and that you cite generally all persons

having any right, title or interest to or in said vessel or steamship "Allegheny," her boilers, engines, machinery, tackle, apparel and furniture, that they appear before the Honorable, the Judges of the District Court of the United States for the District of Delaware, on Tuesday, the sixth day of November, A. D. 1894, at eleven o'clock in the forenoon at the United States Court Rooms in the city of Wilmington, in said District, to answer the libel of Gustave Alix, Master of the Belgian steamship "Caucase," on behalf of the owners of said steamship in a cause of collision, civil and maritime.

And that you give notice of the arrest, and of the time and place of the return of this process, and of the hearing in *The Morning News* and *The Every Evening*, newspapers printed at Wilmington aforesaid.

Witness the Honorable Leonard E. Wales, Judge of the said District Court, and the seal thereof, at Wilmington aforesaid, on this twenty-second day of October, A. D. 1894, and the Independence of the United States, the one hundred and nineteenth.

And on the same day to wit: October 22, 1894, the said libellant, by H. L. Cheyney and John F. Lewis, his Proctors, appear and file the following consent for the release of said steamship from attachment, as follows:

"WILMINGTON, DEL., Oct. 22, 1894.

Alix, Master *vs.* Steamship "Allegheny."	D. C. D. of Del., No. 508.

We agree that the "Allegheny" may be released from the custody of the Marshal by proper security in the sum of twenty-six thousand dollars being entered.

(Sgd) H. L. CHEYNEY,
JNO. F. LEWIS,
Proctors for Libellant."

1894, NOVEMBER 6th.

The Marshal returns on process of attachment and monition, as follows :

MARSHAL'S RETURN ON PROCESS.

"After diligent search I hereby certify that I found the within-named vessel within my District, in a wrecked condition, said vessel being sunk below the level of the water in the Delaware Bay, near Ship John Light, and I have been unable to attach the same.

Dated, Nov. 6, 1894.

So Answers.

(Sgd) HEWSON E. LANNAN,
U. S, Marshal."

1894, NOVEMBER, 23d.

This day came the said libellant by his said proctors, and filed his præcipe for the issuance of an *alias* process of attachment and monition, as follows :

Gustave Alix, Master of the steamship "Caucase."	D. C. U. S.
vs.	District of Delaware,
The steamship "Allegheny," whereof, Tucker now is or late was master.	No. 508, in Admiralty.

Issue *alias* writ of attachment of the steamship "Allegheny," *sur* libel filed in above cause, returnable *sec. leg.*

(Sgd) HORACE L. CHEYNEY,
JOHN F. LEWIS,
Proctors for Libellant.

To CLERK, D. C.

And on the same day, to wit: November 23, 1894, *alias* process of attachment and monition against said steamship "Allegheny" issued, as follows :

Alias Process of Attachment and Monition.

UNITED STATES OF AMERICA, }
DISTRICT OF DELAWARE. } *ss.*

The President of the United States of America. To the United States Marshal for said District, GREETING:

YOU ARE COMMANDED, as you have been before commanded that you attach the steamship "Allegheny," her tackle, apparel and furniture, and that you cite generally all persons having any right, title or interest to or in said vessel or steamship "Allegheny," her tackle, apparel and furniture, that they appear before the Honorable, the Judge of the District Court of the United States for the District of Delaware, on Saturday, the eighth day of December, A. D. 1894, at eleven o'clock in the forenoon, at the United States Court room in the city of Wilmington, in said District, to answer the libel of Gustave Alix, master of the steamship "Caucase," in a cause of collision, civil and maritime.

And that you give notice of the arrest, and of the time and place of the return of this process, and of the hearing in *Morning News* and *Every Evening*, newspapers printed at Wilmington, aforesaid.

Witness, the Honorable Leonard E. Wales, Judge of the said District Court, and the seal thereof, at Wilmington aforesaid, on this twenty-third day of November, A. D. 1894, and the Independence of the United States the one hundred and nineteenth.

(Sgd) S. RODMAN SMITH,

U. S. District Court Clerk,
District of Delaware.

[SEAL]

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF DELAWARE.

Gustave Alix, Master of steamship "Caucase,"	No. 508,
vs.	
The steamship "Allegheny," her boilers, etc.	In Admiralty.

And now, to wit: this fifth day of December, A. D. 1894, upon the application of the Marshal, and it appearing to the Court that there will not be sufficient time for the publication of the monition in said cause as heretofore ordered, before the return day of the said monition and attachment; it is ordered that the time for a return of the same be extended until Saturday, the fifteenth instant, at eleven o'clock A. M.

And it is further ordered by the Court, that publication be made twice in the newspapers designated in said writ.

PER CURIAM.

Attest:

S. R. SMITH,
Clerk U. S. District Court,
[SEAL] *District of Delaware.*

1894, DECEMBER 5th.

This day come the said Marshal and upon his application the Court extended the time for the return of said *alias* attachment and monition, as follows:

Gustave Alix, Master, etc.	U. S. District Court,
vs.	No. 508,
Steamship "Allegheny," etc.	In Admiralty.

Upon the application of the Marshal, and it appearing to the Court that there will be sufficient time for the publication

of the monition in said cause as heretofore ordered before the return day of said monition and attachment, it is ordered that the time for the return of the same be extended until Saturday, the fifteenth instant, at 11 o'clock A. M. And it is further ordered that publication be made twice in the newspapers designated in said writ.

1894, DECEMBER 15th.

The Marshal returns on *alias* process of attachment and monition, as follows:

MARSHAL'S RETURN ON ALIAS PROCESS OF ATTACHMENT, ETC.

In obedience to the within writ I did on the second day of December at 1.15 o'clock P. M., A. D. 1894, in the Delaware River off Bombay Hook, in my District, seize and attach the within mentioned property and I have duly cited all persons to appear and assert their claims, pursuant to the commands of the within writ and the annexed order of the Court. Dated at Wilmington, this fifteenth day of December, A. D. 1894.

So Answers.

(Sgd) HEWSON E. LANNAN,
U. S. Marshal, District of Delaware.

And afterwards, to wit: at a stated term of said Court, begun and held at the city of Wilmington, aforesaid, on the second Tuesday, being the fourteenth day of January, A. D. 1896.

Present.—The Honorable LEONARD E. WALES, District Judge, presiding, the following proceedings were had, to wit:

1896, MARCH 30h.

This day came the said respondent, by Lewis C. Vandegrift, Esq., his Proctor, and filed his answer, as follows:

Answer of Harry Tucker, Master and Claimant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

Gustave Alix, Master of the Belgian Steamship "Caucase" *vs.* British Steamship "Allegheny."	Libel for Damages.

To the Honorable Leonard E. Wales, Judge of said Court:

The answer of Harry Tucker, Master and claimant, on behalf of all concerned of the British steamship "Allegheny" to the libel and complaint of Gustave Alix, Master of the Belgian steamship "Caucase," in a cause of collision, civil and maritime, alleges as follows:

1. The respondent admits that the steamship "Caucase" is a Belgian bulk-oil steamship, but he has no knowledge of the tonnage of the said steamship "Caucase," or of the place where she was built, and prays that the same be duly proved if material. It is denied, however, that at the time of the collision in said libel mentioned, the said steamship "Caucase" was tight, staunch and strong, and in every way fitted for the voyage upon which she was bound. It is admitted that the steamship "Allegheny" was engaged in carrying petroleum in bulk.

2. The respondent denies that the said collision between the steamship "Caucase" and the steamship "Allegheny" occurred in the manner stated in the second paragraph of the said libel, and alleges that the true facts relative thereto are as follows:

On the morning of Monday, October first A. D., 1894, at half-past four o'clock, the said steamship "Allegheny," being staunch, strong and in every way fitted for the voyage

on which she was bound, was proceeding down the Delaware River on a voyage from Philadelphia, Pennsylvania, to Bergen, Norway, laden with a cargo of oil, both in bulk and in barrels. The night was clear but dark; the tide-ebb, with moderate wind, blowing from the north-northeast. A duly licensed pilot was on the bridge with the second officer and helmsman, and two seamen were keeping a careful lookout forward. All regulation lights were duly set and brightly burning. At about the time mentioned, the steamship "Allegheny," being near ship John Light and about mid-channel, sighted the mast-head light, and shortly afterwards the side-lights of an approaching steamer coming up the river (afterwards ascertained to be the Belgian steamship "Causase") a little on her starboard bow, and some distance off. These lights were duly reported. When the two steamers had approached to within proper signaling distance, the "Allegheny" blew two blasts and starboarded her helm, the "Caucase" answering also by two blasts and starboarded her helm, thereby putting out her red light and showing only her green. The two steamships were about to pass starboard to starboard, in accordance with the arrangement agreed upon, when, at a comparatively short distance from the "Allegheny," the green light of the "Caucase" was shut out, her red again appeared, and she turned broad off across the bows of the "Allegheny" as though about to pass her port to port instead of starboard to starboard as had been arranged, and thereby rendering a collision with the "Allegheny," inevitable if the latter continued the course she was on. In order to avoid such collision, the "Allegheny" thereupon sounded one blast and ported her wheel, and would have passed, port-side to port-side, had the "Caucase" continued the course she was then on, but the "Caucase" again changed her course by starboarding her helm after the "Allegheny" had signaled to pass port to port, and in an effort to resume her former course, or for some other reason unknown to the respondent, came in under a starboard wheel against the port quarter of the "Allegheny" with terrific force, striking her about the engine-room and

cutting her down so that she sank in fifteen or twenty minutes in eight fathoms of water, her officers and crew escaping with some difficulty upon a tow-boat.

3. The respondent denies that the said collision was due to any negligence, misconduct, or want of proper care on the part of those in charge of the steamship "Allegheny," but on the contrary, avers that said collision was solely due to the negligence, misconduct, inattention and want of proper care and skill of those in charge of the steamship "Caucase," and specially in the following particulars:

(*a*) In not maintaining a proper and attentive lookout.

(*b*) In porting her wheel and attempting to cross the course of the "Allegheny" after she had agreed to pass starboard to starboard and in giving no notice to the steamship "Allegheny" of her intention and change of course.

(*c*) In failing to continue upon a port wheel at the last whereby the collision could have been avoided.

(*d*) In starboarding her helm after porting it whereby her bow struck the port quarter of the steamship "Allegheny" which otherwise would have passed in safety.

(*e*) In delaying all measures of precaution until too late and taking no proper measures to avoid the collision.

4. It is denied that the damages suffered by the "Caucase" will amount to the sums mentioned in the fourth paragraph of the libel, and it is averred that the same as therein set forth are greatly exaggerated.

5. It is believed that the said steamship "Allegheny" and her cargo are a total loss.

6. Respondent further answering said libel alleges that wreckers have attempted to raise said steamship "Allegheny," but have not yet succeeded in properly righting and floating her. It is impossible at this time to say what, if any value

said steamship has. It is believed that she will prove a total loss. Of her cargo a very small portion only has been recovered.

7. At the time of the happening of the collision no owner of the steamship "Allegheny" was on board thereof and the same happened without the neglect, design, knowledge or privity of said owner, and respondent expressly denying that the said collision was in any way attributable to the negligence and fault of those in charge of said steamship "Allegheny" claims on behalf of Edward Stuart, owner of said steamship "Allegheny," and on behalf of her underwriters the benefit of the provisions of the Act of Congress of March 3, 1851, sections 4283 and 4284 of the Revised Statutes of the United States and the Supplements thereto relating to the limitation of the liability of ship owners. He therefore prays that if it should be held that the said collision was due to any neglect or fault of those in charge of the said steamship "Allegheny" that the liability of the owner or underwriters thereof shall be limited to the value of the said steamship in her damaged condition, which respondent avers to be nothing as at present advised; and that the respondent or the owner or Underwriters of said steamship may take all further proper and legal steps under said Act of Congress and its Supplements for the purpose of securing such limitation of liability.

That all and singular the premises are true.

Wherefore the respondent prays that the Court will be pleased to pronounce against the libel aforesaid and condemn the libellants in costs and otherwise right and justice to administer in the premises.

(Sgd) HARRY TUCKER,

By LEWIS C. VANDEGRIFT,

His Proctor.

BIDDLE & WARD,
BRADFORD, VANDEGRIFT & BYRNE,
Proctors.

DISTRICT OF DELAWARE, *ss.*

LEWIS C. VANDEGRIFT, being duly sworn according to law, doth depose and say, that he is proctor for Harry Tucker, master of the steamship "Allegheny;" that the said Harry Tucker, is absent from the United States, that deponent is specially instructed as to the facts in the foregoing answer, and that they are true to the best of his knowledge, information and belief.

(Sgd) LEWIS C. VANDEGRIFT.

Sworn and subscribed to before me, this 30th day of March, A. D. Eighteen hundred and ninety-six, as witness my hand and official seal.

(Sgd) S. R. SMITH,
U. S. Com'r.

(Seal)

Copy of Agreement for Removal of Steamship from Delaware.

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF DELAWARE.

Alix, Master of the S. S. "Caucase,"
vs.
Steamship "Allegheny."

Tucker, Master of the S. S. "Allegheny,"
vs.
Steamship "Caucase."

STIPULATION OF COUNSEL.

WHEREAS, the steamship "Allegheny" has been attached by the United States Marshal for the District of Delaware, in a claim of damages alleged to have been sus-

tained by the steamship "Caucase" by reason of a collision between the two steamships, and the bond as required in and whereas the owners, underwriters and the salvers of the said steamship "Allegheny" desire that she shall be brought to the city of Philadelphia as promptly as possible, there being no facilities or dry dock to repair her in the State of Delaware.

It is hereby expressly stipulated by the Proctors in the above entitled cause that the removal of said steamship "Allegheny" from the jurisdiction of the United States District Court for the District of Delaware shall not prejudice the Master, owners or underwriters of the steamship "Caucase," nor the Master, owners or underwriters of the steamship "Allegheny," with respect to any of the rights which either of the said parties may have acquired by reason of the attachment of the "Allegheny" by the Marshal of the United States District Court for the District of Delaware; and the removal of the said steamship from the District of Delaware shall not prejudice the rights of the owners or underwriters of the "Caucase" to assert that their lien for damages against the "Allegheny" is prior to that of the salvors, nor prejudice the salvors nor the Master, owners or underwriters of the "Allegheny" with respect to their right to claim the benefit of the Limited Liability Acts of Congress, the intention of the parties hereto being that the jurisdiction shall remain as though the said steamship had not been removed from the State of Delaware.

It is also agreed that the removal of the said steamship from the District Court of Delaware and the assent to said removal of the Master, owners and underwriters of the "Caucase" shall not prejudice them from filing a cross libel against the owners of the steamship "Allegheny" and requiring a bond to be entered to respond to the "Caucase's" claim or otherwise to stay proceedings of the "Allegheny" should such right exist, and also without prejudice to the Master, owners and underwriters of the steamship "Allegheny" to order the bond for release required if entitled so to do.

This agreement is to be construed in all cases as if the "Allegheny" were still within the jurisdiction of the District of Delaware and still subject to the attachment of the Marshal until that status has been changed.

IN WITNESS WHEREOF the proctors for the steamship "Allegheny" and for the steamship "Caucase" and for the respective masters, owners and underwriters thereof have hereunto set their hands and seals this day of March, A. D. 1895, and Mr. William W. Curtin undertakes to assent to this agreement also in behalf of the salvors.

JOHN F. LEWIS,
in behalf of "Caucase" and owners and underwriters;

J. RODMAN PAUL,
on behalf of steamship "Allegheny," her owners and underwriters;

W. W. CURTIN,
on behalf of the Salvors;

and it is agreed until further action and agreement, the "Allegheny" to remain in the legal custody of the Marshal for the District of Delaware.

J. R. P.
J. F. L.

APRIL 24, 1895.

It is further agreed that the steamship "Allegheny" may be removed, still in the custody of Marshal of Delaware, as a true provision to Mills' yard in the District of New Jersey, for the purpose of being upturned and righted.

JOHN F. LEWIS,
for "Caucase," owners and underwriters;

J. RODMAN PAUL,
for steamship "Allegheny," her owners and underwriters;

W. W. CURTIN,
for salvors.

Copy of Notices of Possession of Delaware Marshal.

April 25th, 1895.

To the Sheriff of Camden County,
Camden, New Jersey.

Dear Sir:

I have to notify you that I attached the British steamship "Allegheny," etc., respondent in the above entitled cause, and by virtue of the process of the said Court issued in said cause, I have duly cited by advertisement in the daily papers at Wilmington, Delaware, all persons to appear and assert their claims. The said steamship "Allegheny" is to be moved temporarily to Camden, New Jersey, to be righted.

Very respectfully,

(Sgd) HEWSON E. LANNAN,
U. S. Marshal, District of Delaware.

April 25th, 1895.

J. Willard Morgan, Esq.,
U. S. Commissioner,
206 Market Street, Camden, N. J.

Dear Sir:

I have to notify you that I attached the British steamship "Allegheny," etc., respondent in the above entitled cause, and by virtue of the process of the said Court issued in said cause, I have duly cited by advertisement in the daily papers of Wilmington, Delaware, all persons to appear and assert their claims. The said steamship "Allegheny" is to be moved temporarily to Camden, New Jersey, to be righted.

Very respectfully,

(Sgd) HEWSON E. LANNAN,
U. S. Marshal, District of Delaware.

April 25th, 1895.

George Pfeiffer, Esq.,

U. S. Marshal for the District of New Jersey,

Trenton, New Jersey.

Dear Sir:

I have to notify you that I attached the British steamship "Allegheny," etc., respondent in the above entitled cause, and by virtue of the process of said Court issued in said cause, I have duly cited by advertisement in the daily papers of Wilmington, Delaware, all persons to appear and assert their claims. The said steamship "Allegheny" is to be moved temporarily to Camden, New Jersey, to be righted.

(Sgd) HEWSON E. LANNAN,

U. S. Marshal, District of Delaware.

May 16th, 1895.

U. S. Marshal,

District of Delaware.

Dear Sir:

Mr. John L. Mills, at whose shipyard in Camden, N. J., this steamer has been delivered, is about beginning the work of turning her right side up. As you know, others have tried and failed to do this work. It is a serious undertaking and will require a large expenditure by Mr. Mills, and if he completes it successfully he will expect the ship to remain in his possession until he is paid for the work. If you do not approve of such an undertaking please take the ship away at once.

Very truly,

(Sgd) CURTIS TILTON,

Atty. for John L. Mills.

April 25th, 1895.

George Pfeiffer, Esq.,

U. S. Marshal for the District of New Jersey,

Trenton, New Jersey.

Dear Sir:

I have to notify you that I attached the British steamship "Allegheny," etc., respondent in the above entitled cause, and by virtue of the process of said Court issued in said cause, I have duly cited by advertisement in the daily papers of Wilmington, Delaware, all persons to appear and assert their claims. The said steamship "Allegheny" is to be moved temporarily to Camden, New Jersey, to be righted.

(Sgd) HEWSON E. LANNAN,

U. S. Marshal, District of Delaware.

May 16th, 1895.

U. S. Marshal,

District of Delaware.

Dear Sir:

Mr. John L. Mills, at whose shipyard in Camden, N. J., this steamer has been delivered, is about beginning the work of turning her right side up. As you know, others have tried and failed to do this work. It is a serious undertaking and will require a large expenditure by Mr. Mills, and if he completes it successfully he will expect the ship to remain in his possession until he is paid for the work. If you do not approve of such an undertaking please take the ship away at once.

Very truly,

(Sgd) CURTIS TILTON,

Atty. for John L. Mills.

MAY 21st, 1895.

S. S. "ALLEGHENY."

CURTIS TILTON, ESQ.,

Atty. for John L. Mills,

419 Walnut Street, Phila., Pa.

Dear Sir:

I acknowledge the receipt of your letter of May 16, 1895, and in reply thereto advise you that the "Allegheny" is under attachment by me under process issued out of the United States District Court for the District of Delaware. Please so inform Mr. Mills. I am not called upon to approve or disapprove any contract made in the premises.

Yours truly,

(Sgd) HEWSON E. LANNAN,

U. S. Marshal.

166-136

Supreme Court of the United States.

No. . Original.

Ex-parte

GUSTAVE ALIX, MASTER OF BELGIAN STEAMSHIP "CAUCASE."

Suggestion for Writ of Prohibition

to be directed to the Judge of the District Court of the United States in and for the District of New Jersey.

Preliminary Brief on Behalf of Petitioner, submitted upon Presentation of Petition.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Counsel.

348-349 Bourse Building,
Philadelphia.

IN THE

Supreme Court of the United States.

Ex-parte GUSTAVE ALIX, Master of Belgian steamship "CAUCASE."	No. . ORIGINAL.

Suggestion for a Writ of Prohibition to be directed to the Judge of the District Court of the United States, for the District of New Jersey.

PRELIMINARY BRIEF ON BEHALF OF PETITIONER.

This petition for a writ of prohibition presents but one simple question.

The steamship "Allegheny" was in the legal custody of the Marshal of the District Court of the United States for the District of Delaware, under an attachment issued out of said Court, upon a libel filed by the petitioner.

The steamship had been injured by a collision, and there being no place within the District of Delaware where the vessel could receive the proper protection, by direction of the parties in interest, the Marshal permitted said steamship to be removed, in his legal custody, from the territorial limits of the District of Delaware into the territorial limits of the District of New Jersey, where she continued to remain in his legal custody. While there, in his custody, a libel was filed against said steamship in the District Court for the District of New Jersey, and the Marshal of the latter Court thereupon forcibly and violently ejected the Marshal of said District Court for

the District of Delaware from said steamship and took possession thereof, claiming as his authority the writ issued out of said District Court of New Jersey.

The foregoing circumstances present the sole question, whether the District Court for the District of New Jersey has acquired jurisdiction over said steamship by reason of the attachment above mentioned.

I.

The right to issue a writ of prohibition in this case is not open to question.

In re Cooper, 147 U. S., 472.
In re Rice, 155 U. S., 396.
In re N. Y. and Porto Rico S. S. Co., 155 U. S., 523.

II.

It is impossible for two courts to have jurisdiction over this steamship. The jurisdiction of one court necessarily excludes the jurisdiction of another, and it has therefore been held by this court in Taylor *vs.* Caryl, 20 How., 583, that where two have courts concurrent jurisdiction over the same territory, that court which first attaches property within the territory acquires exclusive jurisdiction over it, and an attachment by the Marshal of the District Court for the Eastern District of Pennsylvania, of a vessel in the custody of the Sheriff of the County of Philadelphia, was therefore held to be invalid.

III.

It follows that if the District Court of New Jersey has acquired jurisdiction, that its jurisdiction is exclusive and was acquired by the jurisdiction of the District Court for the District of Delaware being divested.

Did the removal of the steamship from the District of Delaware, under the circumstances set forth in the petition, divest that Court of the jurisdiction which it had acquired?

The law as to the effect of removal is thus stated in Drake on Attachments, Sec. 292, d.:

"What effect upon an attachment has the removal of the attached property, by the officer, beyond his bailiwick, into a foreign jurisdiction. *It seems clear that the mere fact of such removal, without regard to the circumstances connected with it, will not dissolve the attachment.* In determining its effect therefore, regard must be had to the manner and object of the removal. The first point to be determined is whether the purpose of the removal is a lawful one; and the next, whether possession of the property, personally or by another was continued. If the purpose was lawful and the possession continued the attachment would not be dissolved. But if the purpose was unlawful, though his possession remained, or if lawful and he lost his possession, his special property in the goods would be divested."

That statement of the law is based upon Brownell *vs.* Manchester, 1 Pick. (Mass.), 232, where it was held that a sheriff of the State of Massachusetts, who attached certain sheep in Massachusetts and delivered them to a bailee in Rhode Island to be pastured, did not by that act divest himself of his special property.

The same conclusion was reached by Mr. Justice STORY in the Abby, 1 Mason, 360, where after jurisdiction over that vessel was acquired by the District Court for the District of Massachusetts, by a lawful seizure, she was taken into the harbor of Portland, within the District of Maine, seeking shelter there from an approaching storm. It was contended that by her removal into the District of Maine, jurisdiction of the former Court had been lost, but the Court held otherwise, saying:

"I agree that if there was an absolute abandonment of the seizure, a new seizure might have become necessary. *But to constitute such an abandonment, there must be an intention, coupled with an unequivocal act of dereliction.* There is no pretence of such an intention; and looking to all the circumstances, there is as little pretence to suggest that there was any such act."

In United States *vs.* The Schooner "Little Charles," 1 Brockenbrough, 347 at 355, it is said by Mr. Chief Justice Marshall:

"That possession of the thing is necessary, as a foundation for the jurisdiction of the Court, is, in general, true. There must be seizure to vest the jurisdiction; but it is not believed that continuance of possession is necessary to continue the jurisdiction. *It is a general principle that jurisdiction once vested is not divested, although a state of things should arrive in which original jurisdiction could not be exercised.*"

These authorities seem to leave no doubt but that the removal of the steamship from the District of Delaware in the custody of the Marshal, and by direction of the parties concerned, did not, in any way, divest the jurisdiction of that Court. Certainly the Marshal could not be divested of his special property by the removal of the vessel, for its own protection, from the territorial limits of the District of Delaware.

Not only did that act not divest the jurisdiction of the Court, but it was the *duty* of the Marshal to protect the property by removing it to another district, if there was no place within his own district where it could have the proper degree of protection and attention.

IV.

In conclusion the petitioner submits that the immediate settlement of the conflict of jurisdiction between these two Courts is absolutely necessary, not only for his own protection, but for the protection of the other parties concerned, as in the present situation, no one can, without possibly imperiling his interests, proceed in either Court.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Of Counsel.

Office Supreme Court, U.S.
FILED
MAR 1 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

IN THE MATTER OF THE

PETITION OF GUSTAVE ALIX, Master of the Belgian Steamer "Caucase," for a Writ of Prohibition

TO

THE UNITED STATES DISTRICT COURT
For the District of New Jersey

BRIEF

In Behalf of John L. Mills, and Against the Petition for a Writ of Prohibition

CURTIS TILTON
Counsel for John L. Mills

419 Walnut Street

T 43

Supreme Court of the United States

IN THE MATTER
OF
THE PETITION OF GUSTAVE ALIX, MASTER OF THE BELGIAN STEAMER *Caucase*, FOR A WRIT OF PROHIBITION.

Brief in Behalf of John L. Mills and Against the Rule to Show Cause.

The suit of John L. Mills in the New Jersey District Court is to recover salvage for saving the wrecked and sunken steamer *Allegheny* and her cargo from loss.

The labors of said Mills in saving the wreck and cargo were continuous for seventeen months at Camden, in the New Jersey District, where the wreck lay on the bottom, upset and in mid-river. By said labors and his expenditure of $21,600 he righted, raised and saved the wreck and cargo.

On September 14, 1896, shortly after they were saved, he attached them for salvage, and the New Jersey Marshal took possession of them in the usual manner, peacefully and without opposition.

The wreck had been in the sole possession of salvors about two years, namely, from October, 1894, until it was attached in the said New Jersey suit in September, 1896.

It had been in Mills' sole and undisputed possession in New Jersey for seventeen months before said attachment

Until raised and righted in September, 1896, the wreck was not saved and had no value, and was not susceptible of seizure, and no attachment had been made of it prior to said seizure by the New Jersey Marshal. No one but said salvors exercised any authority or control over the wreck during said long period it lay sunk in the New Jersey District. It was sunk in the track of commerce and had to be guarded from danger by a light at night and by sound signals and a watchman in foggy weather, and secured by chains and cables. No one did these things or attempted or made any pretence of doing them but the salvors, and the New Jersey Marshal after his seizure.

The allegation of the suggestion that the vessel was attached in 1894 by the Delaware Marshal, and the other allegations about the salvors bringing her to Philadelphia under an agreement with said Marshal, to be repaired and docked, are false. There was no such attachment, and no such agreement made by them, and no docking and no repairs. Appendix, 34, 38, 37.

The record of the New Jersey Court shows no evidence of any of the allegations contained in the suggestion of said Gustave Alix.

The Mills case is an ordinary salvage suit, with nothing to distinguish it from any other case of salvage. Salvage is eminently a subject of Admiralty jurisdiction, and it is the policy of the Admiralty to encourage salvors, and reward them liberally.

The New Jersey District Court, therefore, in entertaining said salvage cause is proceeding clearly within its recognized jurisdiction, and must determine, from the evidence before it, whether any circumstances exist in the case which exclude it from the ordinary Admiralty jurisdiction of the Court.

That no reasons for refusing to take jurisdiction exist, is shown by the return. P. 2.

Judge KIRKPATRICK says: "No proofs have been presented attacking the Court's jurisdiction of the cause, and

there is nothing before the Court which would justify it in refusing to exercise its jurisdiction."

As stated in the Court's return, page 2: "The vessel and cargo were attached September 14, 1896, under process issued by said Court, and taken into the actual possession and custody at Camden, in the usual manner, by the New Jersey Marshal, peacefully and without objection."

The New Jersey Marshal had the wrecked vessel in custody three months, and expended more than $3000 in keeping it afloat, by means of steam pumps and a coffer dam. December 22, 1896, the vessel and cargo were sold as perishable, by order of the New Jersey Court, the said sale being ordered with the full knowledge, concurrence and assent of the Delaware Court.

All parties, including said Alix, agreed that a sale of the vessel as perishable was necessary. She could not be kept afloat longer in the ice, and could not be moved.

The New Jersey salvage suit is against vessel and cargo. No one has suggested that the cargo was improperly attached and sold in said suit.

If the facts of the suggestion had any foundation, the special property in the wreck would be in the Delaware Marshal, and he only could make claim and demand its restoration. He has filed no claim, objection or application of any kind in the New Jersey Court.

The petitioner, Alix, has no claim upon or interest in the *res*.

Other material facts appear in the return.

The following objections are submitted to the writ of prohibition:

First.—The subject matter of the New Jersey suit being salvage, therefore maritime, and the vessel and cargo being within the New Jersey District, when saved and when attached the cause is within the ordinary admiralty jurisdiction of the District Court; and matters going to *oust* its jurisdiction must be pleaded and proven and decided in that Court.

The return shows (p. 2) that "no proofs have been presented attacking the Court's jurisdiction." The case is not therefore one for a prohibition.

In Ex Parte Easton the subject matter was maritime and within the Admiralty Court's jurisdiction and this Court refused the prohibition and said:

"Whether the District Court has transcended its jurisdiction in entertaining the described proceeding must depend not upon facts stated *dehors* the record, but upon those stated in the record upon which the District Court is called to act, and by which alone it can regulate its judgment. Mere matters of defence, whether going to *oust* the jurisdiction of the Court or to establish the want of merits in the libellants' case, cannot be admitted under such a petition here to displace the right of the District Court to entertain suits, the rule being that every such matter should be propounded by suitable pleadings as a defence for the consideration of the Court, and to be supported by competent proofs, provided the case is one within the jurisdiction of the District Court."

Ex parte Easton, 95 U. S., 68–78.
Ex parte Christy, 3 How., 292.

In re Cooper, 143 U. S., 509, it is said: "The Court had power to inquire into the facts upon which jurisdiction depended."

Second.—The New Jersey suit has proceeded too far for prohibition. The vessel and cargo have been sold; the proceeds are in Court; other claims are pending against the fund. The New Jersey Marshal has incurred custody charges exceeding $3000. Prohibition is not used to undo what has been done, or for acts already completed.

In *ex parte Easton*, the Court said: "*Nor can the writ be used except to prevent the doing of something about to be done, nor will it ever be issued for acts already completed.*"

Ex parte Easton, 95 U. S., 68–78.
Ex parte Christy, 3 How., 292.
U. S. vs. *Hoofman*, 4 Wall., 158.

Prohibition will not go after sentence unless want of jurisdiction appears on the face of the proceedings in a case.

In re Cooper, 143 U. S., 504.

On the face of the record jurisdiction is here complete.

Third.—"Prohibition should be asked for at the *outset* of the proceedings." Here it is applied for after decree and after a sale of the *res* made with the full concurrence of both District Courts, and by a party who has a complete remedy against the proceeds of the *res* and by appeal; a remedy by cross libel under Rule 53, and a remedy against the bond for value. Return 7.

In re Rice this Court said: "A party who has objected to the jurisdiction at the *outset*, and has no other remedy, is entitled to a writ of prohibition. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the Court is doubtful or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary."

In re Rice, Petitioner, 155 U. S. 403.
Smith vs. *Whitney*, 116 U. S., 167, 173.
In re Cooper, 143 U. S., 472, 495.

Fourth.—The New Jersey salvage suit is against both vessel and CARGO. There is no pretence that the CARGO was attached in Delaware, and no objection on record to the full and complete jurisdiction of the Court over the cargo. Return 2. A prohibition of the suit cannot therefore reasonably be suggested.

Fifth.—Assuming a seizure of the *res* in Delaware the special property in the vessel would be in the Delaware Marshal, not in Gustave Alix. The Marshal should have objected to the New Jersey Court's jurisdiction, claimed the property, and asked for its restoration to him. Five months have elapsed since the attachment in New Jersey, and he has done nothing either in the New Jersey Court or here or elsewhere.

Objection to the jurisdiction should be made at the the *outset*, where prohibition is asked for.

In re Rice, 155 U. S., 403.

"For any violation of his possession the officer may maintain trover, trespass or replevin.

"And the officer alone can maintain any such action: it "cannot be maintained by the attachment plaintiff."

Drake on Attachment, Sec. 291, p. 279.
Skinner vs. *Stuart*, 39 Barbour, 206.
Schaeffer vs. *Marienthal*, 17 Ohio State, 183.

Sixth.—Assuming a seizure, the full concurrence and assent of the Delaware Court to the sale of the *res* by the New Jersey Court (Return, p. 4) was an unconditional abandonment of all claims to the possession of the *res* or proceeds; no ground for prohibition could survive such assent and concurrence.

Drake on Attachment, Sec. 251.

Seventh.—This Court said, in *Covell* vs. *Heyman*, that: "No judicial process, whatever form it may assume, "can have any lawful authority outside of the limits of "the jurisdiction of the Court or Judge by whom it is "issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

Covell vs. *Heyman*, 111 U. S., 183.
Ableman vs. *Booth*, 21 How., 506.
D'Arcy vs. *Ketchum*, 11 How., 165.
Waples on Att., 450.

It would be subversive of the orderly administration of justice to give effect to judicial process and to an alleged attachment under it in a foreign district for a period of two years, when the attaching officer had neither possession nor control of nor responsibility for the safety of the property at any time during said long period of alleged custody outside the limits of his district or jurisdiction; and especially when, as in this instance, the wreck was taken from the dis-

trict by salvors, before it was saved or of any value, and while their salvage operations were in progress, and in pursuance of their salvage contract, and without any agreement with the Marshal respecting its removal or return (Appendix 34, 38), and when its return was a physical impossibility, as appears from the New Jersey Marshal's affidivits showing the condition of the wreck when finally raised. Appendix 11, 12, 14.

Eighth.—There never was a lawful seizure of the wreck by the Delaware Marshal, because it was not susceptible of seizure. It was not saved; it was bottom up and could only be kept for brief periods afloat by the constant labors and complicated appliances of a large force of salvors. The Marshal could not possibly have made an attachment effective.

The wreck while thus in process of being saved by the salvors from the sea perils which had overwhelmed it was in an analogous situation to property in process of manufacture which is not subject to seizure.

"Where property is so in the process of manufacture and "transition as to be rendered useless, or nearly so, by having "that process arrested, and to require art, skill and care to "finish it, and when completed it will be a different thing, it "is not subject to attachment."

Drake on Att., Sec. 250.

"Such, too, are materials in the process of fusion in a "glass factory, burning ware in a potter's oven, a burning "brick kiln, or a burning pit of charcoal. In all such cases "the officer cannot lawfully attach." *Id.*

In *Penhallow* vs. *Dwight*, 7 Mass., 34, it was held that an entry on land for the purpose of levying an execution on unripe corn or other produce which would yield nothing, but in fact be wasted and destroyed by the very act of severing it from the soil would be illegal.

Drake on Att., Sec. 250 note.

If the Marshal had seized the wreck it would have been

wholly destroyed; it would have sunk, and as an obstruction to navigation been blown up, as was repeatedly threatened by the United States authorities.

"If the nature of the property is such that it cannot be "taken into the physical possession of the officer without its "destruction, it cannot legally be so taken; if, though attached, "it cannot be removed without such result, it is not legally "removable.

"Illustrations are found in the nature of growing crops "in the field, articles under process of being manufactured," etc.

Waples on Attachment and Garnishment, Sec. 285, p. 211.

He cites the following cases:

Raventas vs. *Green*, 57 Cal., 254.
Bond vs. *Ward*, 7 Mass., 123.
Wilds vs. *Blanchard*, 7 Vt., 138.
Wallace vs. *Barker*, 8 Vt., 440.
Bank vs. *Light Co.*, 97 Ala., 465.

Ninth.—The pretended seizure was wholly invalid because there was no change in the possession, control of, or responsibility for the *res*, which remained in the salvors' possession. Salvors have a proprietary interest in the saved property, and cannot be divested of possession by the owners, and are in a position analogous to that of defendants in an ordinary attachment suit. The wreck has since been abandoned to the contracting salvors, who thus become actual defendants. Leaving the *res* in the possession of the salvors (defendants) was not a seizure, and raises no presumption even of a seizure.

"It is of special importance that an officer should not "leave attached property in the possession of the defendant."

"And in such case it has been held that the officer has "not even constructive possession of the property. Hence "he cannot constitute as his agent to keep the property,

"either the defendant or a servant of the defendant, who "continues in the defendant's employ."

Drake on Attachment, Sec. 292a, P. 281.
Knap vs. *Sprague*, 9 Mass., 258.
Pillsbury vs. *Small*, 19 Maine, 435.
Gower vs. *Stevens*, 19 Maine, 92.
Russell vs. *Major*, 29 Missouri Appeal, 167.

"Where an officer leaves attached goods in the posses- "ion of the defendant, or has ceased to retain possession of "them, and another officer attempts to attach them, notice "to him of the first attachment will not prevent his acquir- "ing a lien on them; for, though an attachment may have "been made, yet the second officer may justly assume it to "have been abandoned, when the possesion of the first officer "was relinquished."

Drake on Attachment, Sec. 292 b, P. 282.
Bagley vs. *White*, 4 Pick, 395.
Sanderson vs. *Edwards*, 16 *Ibid.*, 144.
Gower vs. *Stevens*, 19 Maine, 92.
Young vs. *Walker*, 12 New Hamp., 502.
Flanagan vs. *Wood*, 33 Vermont, 332.

An alleged attachment in 1894 of a wreck should raise no presumption even, that the attachment still survived in 1896 against the *res* in another district, and not really existing as saved property until 1896, and at no time under the control of the alleged attaching officer.

Tenth.—There must be an actual seizure of the ***res***. There was neither seizure, possession, control nor responsibility for the wreck by the Delaware Marshal. The salvors, by working on the high tides, were bringing the wreck, still sunk and bottom up, to Philadelphia in pursuance of their original salvage contract made in October, 1894. While so employed the Marshal made his pretense of seizure. He was told by the salvors he could have the wreck, but she would sink in an hour, and he thereupon refused to take possession

or control of her, but got on the bottom of the wreck where the salvors were working. The following case is analagous:

"Where an officer having an attachment got into a wagon "in which the defendant was riding, and told the defendant "that he attached the horse harnessed to the wagon, and then "rode down street with the defendant, without exercising any "other act of possession and left the horse with the defend- "ant upon his promising to get a receiptor for it; it was held "that, as the horse had not been under the officer's control "for a moment, or, if it could be considered that he had an "instantaneous possession, it was as instantaneously aban- "doned, there was no attachment."

Drake on Attachment, Sec. 202, P. 190.
French vs. *Stanley*, 21 Maine, 512.

"What is meant by saying, that there must be actual "seizure is that there must be a real transfer of the legal "possession and control from the debtor to the sheriff."

Waples on Attachment & Garnishment, Sec. 287, P. 212.

"Seizing goods by merely declaring them to be seized, and posting notice of the attachment and making return, does not constitute a legal attachment. Certainly, such acts would not be of avail in competition with a second attachment actually made and the goods legally retained by the officer, or by a keeper duly appointed."

Waples on Attachment & Garnishment, Sec. 289, P. 212.

Eleventh.—The undisputed facts of the case show that: The petitioner, Alix, could not have any legal claim upon the wreck of the *Allegheny* for the *Caucase* collision, because the wreck had no value as it lay on the bottom after the collision, but was, as the salvage operations show, worth $29,000 less than the moneys expended to raise it. (Appendix 34.)

The limitations of liability acts have been pleaded and

the value of the wreck as it lay on the bottom alleged to be "nothing." The value "on the bettom" is all that can be recovered, and is the proper valuation. This Court so decided and said: "It follows from this that the proper valuation of the steamer was taken in the Court below, namely, *the value which she had when she had sunk and was lying on the bottom of the sea.* "That was the termination of the voyage. * * * Any salvage operations undertaken for the purpose of recovering from the bottom of the sea any portion of the wreck, after the disastrous ending of the voyage as above supposed, can have no effect on the liability."

The City of Norwich, 118 U. S., 492.
The Scotland, 105 U. S., 24.

Judge KIRKPATRICK states in the Return, page 7:

"It appears by the record that the salvage expenses of "raising the said steamer exceed her value when raised, "and that she has been abandoned by her owners and under- "writers to the American Salvage Company, the contracting "salvors. (Appendix, p. 41.)

"Primarily from these facts Gustave Alix, for the col- "lision mentioned in his petition, would be deemed to have "no lawful claim against said salved steamer."

Twelfth.—The motive of this proceeding is to force the payment of a large sum claimed by the Delaware Marshal for more than two years of custody fees when there has been no custody, possession or responsibility for or care of the wreck by him and while it has been in another District. (Appendix, 34.)

This allegation is confidently made because the Marshal offers to abandon all pretense of seizure or custody if he is paid these fees which are not lawfully due.

Thirteenth.—The attempt to explain a removal of the wreck to the New Jersey District by an alleged agreement with the Marshal fails because the salvors made no such agreement and neither signed nor authorized the signing of such agreement, because none of the alleged purposes of the

removal, namely, the repair and docking of the ship, were true or were performed or attempted to be performed, but on the contrary the wreck was abandoned by her owners, and docking and repairs were not possible for two years thereafter; because repairing a vessel in legal custody is unlawful and the law gives no lien for such repairs, and an agreement to go to a foreign District for such unlawful purpose, without provision for the return of the *res*, would divest any lien the Marshal had acquired. The jurisdiction of the Court of such foreign District over the *res* while in its own District and over the repairs, salvage, and collision liens accruing against it in its own District, cannot be *ousted* by such an agreement.

"If the purpose in removing attached property into a foreign jurisdiction be unlawful, though possession remain, or if lawful, and he lost possession, the special property of the officer in the goods would be divested."

Drake on Attachments, Sec. 292, etc.

From all of the foregoing, it is submitted that a proper case for awarding the writ of prohibition is not made out.

CURTIS TILTON,
Counsel for John L. Mills.

166-136

Office Supreme Court, U. S.
FILED.
MAR 1 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court

OF THE UNITED STATES

15 Orig.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

IN THE MATTER

OF

The petition of Gustave Alix, Master of the Belgian Steamer "Caucase," for a writ of prohibition

TO

The United States District Court for the District of New Jersey

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RETURN TO ORDER TO SHOW CAUSE

Supreme Court of the United States. 1

In the Matter

of

The Petition of Gustave Alix, Master of the Belgian Steamship "Caucase."

To the Supreme Court of the United States: 2

In obedience to the order of the Supreme Court in the above entitled matter, requiring the undersigned as Judge of the District Court for the District of New Jersey, to show cause why a writ of prohibition should not be granted, as prayed for in the petition of the above named petitioner to the Supreme Court sworn to on the ninth day of January, 1897, the undersigned respectfully submits:

That jurisdiction of the salvage suit of John L. Mills, against the wrecked steamer *Allegheny* and her cargo was entertained by this Court because it appeared from the libel that said Mills had performed salvage services which saved said steamer and her cargo from loss, and from their submerged condition; and that said steamer and her cargo had been for seventeen months at Camden, in this district, and in 3

4 the sole and undisputed possession of the libellant while his salvage operations were in progress, and were then upon their successful completion still in his sole and undisputed possession at the same place in this district. They were accordingly attached on September 14, 1896, under process issued upon said libel and taken into actual possession and custody at Camden, in the usual manner, by the New Jersey Marshal, peacefully and without objection. That no claim to said ship and cargo was made, and no answer to the libel was filed, and no objection was filed to the jurisdiction of the Court and accordingly on December 2, 1896, after two and one-half months of expensive custody of said vessel and cargo by the New Jersey Marshal a decree *pro confesso* for default of claim and answer was entered in the cause. The steamer and cargo were at Camden within this district when raised
5 and saved and attached in the said Mills suit. The subject matter of the suit being maritime and the vessel and cargo being in this district the cause was deemed to be one within the ordinarily admiralty jurisdiction of this Court. No proofs have been presented attacking the Court's jurisdiction of the cause, and there is nothing before the Court which would justify it in refusing to exercise its jurisdiction.

The libel of said Mills is for saving the cargo as well as the steamer, and both have been attached. No one has averred that the cargo is not the proper subject of said attachment, and of all the proceedings had in said cause. There is no objection upon the record to the full and complete jurisdiction of this Court over the cargo, and no objection to any of the proceedings, orders and decrees, made in relation thereto.

6 The steamer was sold as perishable by the New Jersey Marshal on December 22, 1896, in pursuance of a decree of this Court, entered December 15, 1896, and the sale was confirmed on December 30, 1896. The steamer was thereupon delivered by the Marshal to the purchaser, and is not now, and has not since, been in the custody of the Marshal or of this Court.

The sale of the steamer as perishable was an imperative7 necessity, as appears from the affidavits of the Marshal, Deputy Marshal, and petition for said sale in the Appendix, pp. 10, 11, 14. The necessity of the sale was conceded by all parties who were either regularly or informally before this Court in the cause. She was a badly damaged wreck over $3000 had been expended by the New Jersey Marshal in keeping her afloat, by means of steam pumps and a coffer-dam, during his custody, and the approach of freezing weather had rendered a longer custody perilous, and still more expensive. The vessel could not be moved, and was exposed to drifting ice, which endangered the coffer-dam, and all parties, including the counsel for said Alix, concurred in declaring to the Court that the best interests of all concerned required an immediate sale of the vessel.

The steamer brought at the sale all she was worth. All8 exceptions to the confirmation of the sale alleging inadequacy of price were withdrawn before the sale was confirmed. This appears from the order of confirmation. (Appendix, p. 31.) No proofs or affidavits alleging inadequacy of price were presented.

The steamer was not sold until more than three months after the attachment by the New Jersey Marshal. The record shows that up to the time of her sale neither the said Alix nor the Delaware Marshal had filed any petition, claim answer or other paper objecting to, or in any manner questioning this Court's complete jurisdiction of said steamer and said cause.

After the order of sale had been made, the counsel for Gustave Alix were heard orally on their verbal motion to vacate said order, and at their request the argument referred 9 to in the suggestion of said Alix filed in the Supreme Court was had before the respondent and the Honorable LEONARD E. WALES, Judge of the District Court for the District of Delaware, sitting together at Philadelphia. The said motion was fully argued and was dismissed, and the steamer was ordered to be sold by this Court in the Mills suit with

10 the full knowledge, concurrence and assent of the Judge of the District Court for the District of Delaware. The request for such joint hearing was acceeded to partly because the late Judge EDWARD T. GREEN, my predecessor, had acceded to a similar request, but the hearing by him was not had, owing to his death, and partly because a joint hearing or conference was deemed conducive to a speedy and satisfactory determination of the question raised by said verbal motion, if all the parties voluntarily acquiesced in the conclusion so reached. If the intention of the counsel for said Alix was not to accept the conclusion so reached, the said joint hearing was devoid of any rational purpose.

On December 26, 1896, after the sale of said steamer and cargo, the said Gustave Alix filed a petition of interven-
11 tion in the Mills suit, alleging that said steamer had been attached by the Marshal of Delaware in 1894. The allegations of said petition have not been proven. There is no proof before the Court that the Delaware Marshal seized the steamer in 1894. If he did so, there is no evidence to show a lawful continuance of such seizure beyond his district for two years thereafter. It is not proven how the steamer that was saved in 1896 could have been attached in 1894. There is no evidence of the violent dispossession of the Delaware Marshal alleged in the suggestion for a prohibition. The evidence before the Court showed that the New Jersey Marshal did not see the Delaware Marshal until many weeks after said steamer was attached.

All the material allegations of the petition of intervention of Gustave Alix are denied by the answer filed thereto.
12 It is denied that the steamer was seized or could have been lawfully seized in the Delaware District at any time. The allegation is as follows:

"That at the time of the pretended seizure of said "wrecked steamer by the Marshal of Delaware, and at all "times while the wreck was in, or being towed through, the "District of Delaware, it was a physical impossibility for

"said Marshal to take the said wreck into his custody, or 13
"make a lawful seizure thereof. The wreck was not then
"saved, was bottom up, almost wholly submerged, and, as
"events have since proven, of no value whatever, and kept
"sufficiently afloat to be towed on the high tides only by
"the constant use of the salvors' wrecking appliances, and as
"the Delaware Marshal had no salvage appliances, if he had
"taken possession of said wreck it would have sunk almost
"immediately and obstructed the navigable channel of the
"Delaware and been blown up by the United States authori-
"ties, as they repeatedly threatened to do when the wreck
"was in a far less dangerous locality. The Delaware Mar-
"shal was told this at the time of said pretended seizure, and
"he thereupon refused to take custody or control of said
"wreck or become responsible for the same." (Appendix,
p. 33.) The issues of fact raised by these avermeuts of the 14
intervening petition and answer are deemed to be within the
lawful province of this Court to decide.

It is further alleged, in answer to the said intervention, that the steamer was a wreck, wholly without tackel, and that the Delaware Marshal has not at any time secured the same by a rope, nor placed a light on it at night, nor has any one furnished a light or rope for him, or had anything to do with the wreck in his behalf during the long period it has been in this district; that he has not guarded the wreck in times of fog, although it was in constant danger, and had to be so guarded from vessels navigating the river by day and at night, and that if the Delaware Marshal ever had a claim to the possession of the wreck, his total neglect to protect it from the danger to which it was exposed for seventeen months, when it was lying sunk in the middle of 15
the river in this district, was an unconditional abandonment of such claim.

It is denied that said vessel was removed by the salvors from the District of Delaware, under an agreement with the Delaware Marshal, and averred that the said libellant made no such agreement, and that none of the salvors signed or

authorized the signing of such an agreement, and that W. W. Curtin, who signed the alleged agreement, was not a salvor, but was the attorney in fact for Gustave Alix and the employer of William H. La Boyteaux, who verified the libel for Alix in his said collision suit as the attorney in fact for the said Alix, and that the said steamer was brought to Philadelphia, in pursuance of the original salvage contract made by the American Salvage Company with the owners of the vessel three months before the alleged seizure by the Delaware Marshal—the said company, by the terms of the said contract having agreed to deliver the said steamer in Philadelphia to her owners, and after the salvors brought her to Philadelphia still sunk and bottom up, the port of delivery was changed in said original salvage contract to Camden. (Appendix, pp. 37, 38.)

A removal of said steamer from the Delaware district, under an agreement with the Delaware Marshal has not been proven. There is no evidence that the purposes of her removal as alleged in said Alix intervention, namely, her repair and dry-docking, were carried out or attempted to be carried out; but, on the contrary, it appears that said steamer was not ready for either docking or repairs but was a mere wreck, bottom up, and not saved from her sunken condition and since abandoned by her owners.

Whether, if proved, the alleged agreement or purpose of repairing the steamer while in legal custody, or of removing her from the district for two years without guarding her safety and without provision for or the possibility of her return to the district; or whether the alleged seizure of a mere wreck while it is being kept afloat by the continuous active operations of the salvors in charge of it and when the Marshal would be powerless to make the seizure of the wreck effective, were lawful or unlawful acts and purposes, and their effect upon the jurisdiction of this District Court in the cause are deemed to be matters within the lawful province of the said court to determine.

Other matters affecting the equitable and legal status of said Alix are disclosed by the record, and are deemed perti-

nent to the issues as raised. The said Alix has not perfected 19
his petition of intervention in the Mills suit by giving a stipulation with sureties as required by Rule 34 of the Supreme Court and by Rule 8 of this Court.

It appears by the record that the salvage expenses of raising the said steamer exceed her value when raised, and that she has been abandoned by her owners and underwriters to the American Salvage Company, the contracting salvors. (Appendix, p. 41.) Primarily, from these facts Gustave Alix, for the collision mentioned in his petition, would be deemed to have no lawful claim against the said salved steamer.

The claimants of said steamer denying the jurisdiction of the Delaware District Court, are alleged to have tendered and prayed leave to file in that court a bond or stipulation for the full value of said steamer at the time of her alleged 20
attachment by the Delaware Marshal in said Alix suit. If duly proved, said stipulation for value would be deemed to stand in lieu of said steamer in the said suit.

The said Alix has filed a cross-libel *in personam* in the said Delaware Court against the master of the said steamer for the said collision praying for security upon said cross-libel under Rule 53 of the Supreme Court.

Other salvors have filed libels in this court against said steamer and her cargo and decrees *pro confesso* for default of claim and answer have been duly entered in said cases.

The matters alleged in the suggestion of said Alix filed in the Supreme Court have not been proved in this court. The said suggestion does not contain the record of this court, or any part thereof.

All the proceedings of this court are set forth in the 21
Appendix. An *ex parte* affidavit filed by said Alix without leave and without notice, or the using or reading of the same in this court, and averring matters not provable *ex parte* was improperly filed and has not been included.

All which is respectfully submitted.

ANDREW KIRKPATRICK,
U. S. District Judge.

APPENDIX.

PROCEEDINGS IN THE DISTRICT COURT OF NEW JERSEY.

Libel.

To the Honorable Edward T. Green, Judge of the District Court of the United States for the District of New Jersey:

The libel of John L. Mills, of Cooper's Point, Camden, N. J., against the British steamer *Allegheny*, her boilers, machinery and engines and apparel, and against 400 barrels, more or less, containing oil, being part of the cargo lately laden on said steamer, and all persons claiming any interest therein, in a cause of salvage, civil and maritime, alleges as follows:

First.—That the libellant is a shipwright, having a shipyard and marine railway at Cooper's Point, Camden, in the State of New Jersey.

Second.—That in the month of April, 1895, the said steamer *Allegheny* was towed by the salvors in whose custody, control and possession she then was, to the said shipyard of the libellant at Cooper's Point, in the State of New Jersey, bottom up in a sunken condition damaged from collision and from certain necessary salvage operations, and delivered her into the possession of the libellant for the purpose of having the said steamer turned over upon her bottom.

From that time until the present, the libellant has had the sole, absolute and undisputed possession and control of said steamer, and still has such possession, and during the whole of said period the said steamer has been in this State

and District at the shipyard aforesaid, and during most of the time has been submerged wholly or in part, and resting hard and fast upon the bottom of the river at the shipyard aforesaid and in the State and District of New Jersey.

Third.—That libellant's said shipyard is on the New Jersey banks of the river Delaware, at the north end of Camden, and opposite Petty's Island, which belongs to and is a part of the State and Territory of New Jersey. In conducting libellant's salvage operations, cables, hawsers and chains were run from said steamer to both the Camden and Petty's Island banks of the river so that libellant's entire salvage operations were conducted upon that part of the river, which is exclusively within the territorial limits of the State of New Jersey, and upon the land of said State, and that steamer now lies moored to libellant's wharf in said State and District.

Fourth.—The libellant's said salvage operations were prosecuted continuously during said seventeen months except when interrupted by the state of the weather, and the cost for the labor and materials and special appliances made for said work amount to about the sum of $21,600.

The power exerted and required to be used in turning the said steamer upon her bottom was enormous. The engines and machinery of libellant's marine railway, which are adequate to raise from the water ships of 3000 tons burthen, were used in an effort to turn said steamer, and were found wholly insufficient to make any material progress with the work. Cables of steel, of larger size and greater strength than are commonly used in marine operations, were specially manufactured for said work, and used with special appliances, and gearing, and purchase-power, and pontoons, floats, scows, hoister and wrecking steamer and hydraulic screws to augment the power of the engines and machinery of said marine railway, but were likewise found inadequate to accomplish said work, and dredging machine and steam-pumps were then used to excavate a ditch or trench along

the side of said steamer in the river's bottom, in such rela- 7
tion to the steamer as to partly undermine, and allow one side of said steamer to sink into said trench, and the steamer to rest in part upon her side, with her decks inclining upwards. By this expedient, and the use of the machinery, engines and the gear, pontoons, hydraulic screws, wrecking steamer, and all the special appliances aforesaid, the work of turning said steamer over upon her bottom was successfully completed. The libellant believes and avers that in no other place upon the river Delaware could the power required to turn said ship have been applied to her. When said steamer was turned over upon her bottom, as aforesaid, she was still in a sunken and submerged condition, resting upon the bed of the river, and libellant, after great labor and expense in cleaning out the accumulations of mud in said steamer, and repairing her tanks and compartments, and making them 8
water-tight and pumping them out, and by using the appliances aforesaid, finally succeeded in floating said ship, and making her fast alongside of libellant's wharf, were she now lies.

Fifth.—As the work progressed, libellant found she contained about (400) four hundred water-soaked barrels partly filled with oil, which accumulated with the mud upon the lower side of the ship and greatly increased the power required and difficulties of raising her and turning her. These, libellant at large expense was obliged to remove and store in a water-filled barge specially secured for that purpose. That when exposed to the air said barrels will dry and leak and the oil escape, and are perishable. They have cost libellant all they are worth.

9

Sixth.—That said steamer is built of steel and when sunk in the Delaware was nearly new. That her hull, engines, boilers and machinery are in good condition, and as nearly as libelant can estimate their value, they are worth about sixty-five thousand dollars. She is of British build and owned in England, and her machinery is of modern

10 type, and has been put and kept in good condition at great expense to this libellant.

Seventh.—That libellant was to receive Five thousand dollars for turning said steamer, but he has been obliged to furnish appliances and labor which were to be done and furnished by others, and has spent labor and incurred expense in preserving said boilers, engines and tanks and machiney not provided for by said salvage compensation. That said salvage compensation was expressly not to cover, and included the salvage to which libellant would be entitled for raising said steamer from her submerged condition, pumping her out and bringing to the dock. That libellant's claim and demand is that he should be reimbursed for his expenses and labor in doing said work and awarded such additional sum as this Honorable Court may deem proper compensation
11 for the salvage services aforesaid.

Eighth.—That your libellant has at all times during said salvage operations had said steamer in his sole and undisputed possession, and has by virtue thereof a common law lien upon said steamer for his services and expenses enforceable in this Honorable Court, and has also a lien under the statutes of this State likewise enforceable, and also a lien under the general maritime law for said salvage services.

Ninth.—That all and singular the premises are true and within the admiralty jurisdiction of this Honorable Court.

Wherefore, the libellant prays that process in due form
12 of law according to the course of this Honorable Court in cases of Admiralty jurisdiction may issue against said steamer *Allegheny*, her boilers, machinery, engines and apparel, and against said 400 barrels, more or less, containing oil, and that all persons having any interest therein may be cited to appear and answer the matters aforesaid, and that this Honorable Court will be pleased to decree the payment of the

claim aforesaid, with interests and costs, and that said 13
steamer and said barrels containing oil may be attached and sold to pay the same, and that the libellant may have such other relief as he is in law and justice entitled to receive.

JOHN L. MILLS.

Sworn to and subscribed before me this 14th day of September, A. D., 1896.

J. W. MORGAN,
U. S. Commr.

CURTIS TILTON,
Proctor for Libellant.

A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.* 14

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

Stipulation for Libellant's Costs.

Entered into pursuant to the Rules and Practice of this Court.

WHEREAS, a Libel was filed in this Court, on the Fourteenth day of September in the year of our Lord one thousand eight hundred and ninety-six by John L. Mills, against the British steamer *Allegheny*, her boilers, engines, &c., and against about 400 barrels of oil, for the reasons and causes 15
in the said Libel mentioned, and praying that said vessel may be condemned, &c., and the said Libellant and David Baird, surety parties hereto, hereby consenting, and agreeing that in case of default or contumacy on the part of the Libellant or surety execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars:

16 Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the Stipulators undersigned shall be, and each of them is bound in the sum of two hundred and fifty dollars, conditioned that the Libellant above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or in case of appeal by the Appellate court.

JOHN L. MILLS [L. S.]
DAVID BAIRD [L. S.]

Taken and acknowledged this
14th day of September 1896
before me,
J. W. MORGAN,
U. S. Commissioner.

17

DISTRICT OF NEW JERSEY, *ss.:*

DAVID BAIRD, party to the above stipulation, being duly sworn, on his oath says that he resides at Camden in the District of New Jersey, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

DAVID BAIRD.

Sworn to, this 14th day of
Sept., A. D. 1896, before
me,
J. W. MORGAN,

18 *U. S. Commr.*

A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

Writ of Attachment. 19

UNITED STATES OF AMERICA,

DISTRICT OF NEW JERSEY.

The President of the United States of America.

To the Marshal of the District of New Jersey,

GREETING:

Whereas, a Libel was filed in the District Court of the United States, for the District of New Jersey, on the [illegible] day of September, in the year of our Lord one thousand eight hundred and ninety six, by John L. Mills, against the British steamer *Allegheny*, her boilers, machinery and engines and apparel and against four hundred barrels, more or less, containing oil, being part of the cargo lately laden on said steamer, in a cause of salvage, civil and mari- 20
time, for the reasons and causes in said Libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said steamer or vessel, her tackle, &c., may be cited in general and special, to answer the premises, and all proceedings being had, that the said steamer or vessel, her tackle, &c., may, for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libellant.

You are therefore hereby commanded to attach the said steamer *Allegheny* or vessel, her tackle, &c., and to detain the same in your custody, until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before 21
the said Court to be held at Trenton, in and for the District of New Jersey, on the twenty-ninth day of September inst., at ten o'clock in the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf,

22 And what you shall have done in the premises, do you then and there make return thereof, together with this Writ.

WITNESS, the Honorable EDWARD T. GREEN, Judge of said Court, at the City of Trenton, in the [L. S.] District of New Jersey, this 14th day of September, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the one hundred and seventy-first.

GEORGE T. CRANMER,
Clerk.

Per F. R. BRANDT,
Deputy.

CURTIS TILTON,
Proctor for Libellant.

32

MARSHAL'S RETURN TO WRIT.

In obedience to the within monition, I attached the British steamship *Allegheny* and lot of barrels containing oil, therein described, on the 14th day of September, 1896, at Camden, in this District, and have given due notice to all persons claiming the same, that this Court will, on the twenty-ninth day of September, 1896 (if that day shall be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof, should no claim be interposed for the same.

GEORGE PFEIFFER, JR.,
U. S. Marshal.

Dated Sept. 15th, 1896.

24 A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

At a stated Term of the District Court of the United 25
States, for the District of New Jersey, held at the United States Court House, in the City of Trenton, on the Second day of December in the year of our Lord, one thousand eight hundred and ninety six.

Present:—His Honor, ANDREW KIRKPATRICK, District Judge.

In Admiralty.

JOHN L. MILLS *vs.* THE BRITISH STEAMSHIP "ALLEGHENY" her tackle, etc.	Interlocutory Decree.

26

The Marshall having returned upon the monition issued in the above entitled case, that he has attached the said Steamship, her tackle, etc., and has given due notice to all persons claiming the same, that the Court would, on the 29th day of September, 1896, proceed to the trial and condemnation thereof, should no claim be interposed therefor, and the usual proclamation being made on that day and no person since appearing or interposing a claim to the said Steamship, her tackle, etc.

Now, on motion of Curtis Tilton, proctor for the libellant, it is ordered, adjudged and decreed that the defaults of all persons be, and the same are, hereby entered herein,

And on like motion it is also further ordered that it be referred to J Willard Morgan a Commissioner of this Court to take the libellant's proofs for the causes in libel alleged, 27
and to report the same to this Court with all convenient speed.

ANDREW KIRKPATRICK
Judge.

A true copy.
GEORGE P. CRANMER
[SEAL] *Clerk.*

28

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

JOHN L. MILLS

vs. In Admiralty.

THE BRITISH STEAMER "ALLEGHENY."

To the Honorable Andrew Kirkpatrick, Judge of said Court:

The petition of John L. Mills, libellant, in the above
29 entitled cause, respectfully represents—

First.—That the said steamer *Allegheny* was attached by the Marshal of this District in the above suit for salvage, in the month of September, 1896.

The said steamer when attached as aforesaid by the Marshal had been badly damaged by collision, and had her side stove in and her bow cut off, and had been submerged for a period of two years, and the salvage work of raising her had just been completed when the said attachment was made. That said vessel has since been kept afloat by a coffer-dam built over the broken side of the ship and by pumping her at large expense and securing her at the end of a wharf upon the Delaware River. That the said steamer is in constant danger in cold weather of having the coffer-dam
30 destroyed by ice and of sinking, and is deteriorating from rust and exposure of her machinery to the elements, and is perishable both from chargeableness and said decay.

That the barrels containing oil, saved from the said steamer are water soaked and leaking and perishable from chargeableness and partial loss of their contents.

Wherefore, the petitioner prays that an order of sale of 31
said steamer and her cargo may be made, as perishable.

JOHN L. MILLS.

Sworn to and subscribed before
me this 15th day of December,
A. D. 1896.

J. WILLARD MORGAN,
U. S. Commr.

CURTIS TILTON,
Proctor.

A true copy.

GEORGE T. CRANMER,
[SEAL.] *Clerk.*

32

Affidavit of Marshal for Sale as Perishable.

JOHN L. MILLS,
vs.
S. S. "ALLEGHENY" AND CARGO.

GEORGE PFEIFFER, JR., being duly sworn, deposes and says: I am the U. S. Marshal for the District of New Jersey, and have had the steamer *Allegheny* in my custody and possession under the process of the Court in the above case, since the 14th day of September A. D., 1896. That said steamer is in a wrecked condition, with her bow 33
and stern cut off, and one side broken in below the water line. That she is kept afloat by a coffer-dam and is in a precarious condition and in constant danger of sinking. That she now requires, and has during all of my custody, to be pumped out by a steam pump, and for this purpose a tender with steam up, and engineer and fireman, are required

to be in constant attendance. That with the utmost care and attention, she has once since my attachment narrowly escaped sinking, and filled sufficiently for her stern to touch the bottom. That to keep her afloat, I have once renewed the coffer-dam during my possession of the ship at a large expense, and though this work has been done as well as possible, water can be heard running through the dam into the ship. That the ship lies at the end of a wharf in Camden, exposed to the ice, and in freezing weather, which is now upon us, the risk of keeping the ship afloat is greater than I ought to be required or expected to assume. The ship is not in a condition to be removed from her present position, and there is no place where she could be put with safety if her removal were possible. That a trench could be dug by a mud digging machine along the side of the wharf, but this will involve the hiring of a mud machine to do the digging and the outlay of a large additional sum for custody. That deponent's expenses of custody exceeds already $3500, and deponent submits that he should not be required to make further outlay; and that said steamer from the exposure of her engines and machinery is perishable and is deteriorating, and is also perishable from chargeableness. That the cargo attached consists of oil barrels containing some oil, and said barrels leak, and the cargo is also perishable.

GEORGE PFEIFFER, JR.,

Subscribed and sworn to before me this 15th day of December, A. D. 1896.

F. R. BRANDT,
[L. S.] *Notary Public, N. J.*

A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

At a stated Term of the District Court of the United 37
States, for the District of New Jersey, held at the United States Court House, in the City of Trenton, on the fifteenth day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Present:—His Honor, ANDREW KIRKPATRICK, District Judge.

JOHN L. MILLS
vs.
THE BRITISH STEAMSHIP "ALLEGHENY" AND CARGO.

ORDER FOR SALE AS PERISHABLE.

On reading and filing the sworn petition of John L. Mills, the libellant herein, and the affidavit of George 38
Pfeiffer, Jr., U. S. Marshal for the District of New Jersey, and on the report of the said Marshal made in open Court, of the perishability, deterioration and chargeableness of the said steamship *Allegheny*, her boilers, engines, machinery, apparel, cargo of oil, &c.

It is ordered, on motion of Curtis Tilton, proctor of the libellant, that the said steamship *Allegheny*, her boilers, engines, machinery, apparel, cargo of oil, &c., be sold by the Marshal of this District as perishable, upon six days notice of sale, and that the Marshal pay the proceeds of such sale to the Clerk of this Court, at a session to be holden on the twenty-ninth day of December, 1896, and that a writ of *venditioni exponas* issue accordingly.

ANDREW KIRKPATRICK,
Judge. 39

A true copy.

GEORGE T. CRANMER,
[SEAL.] *Clerk.*

40

Affidavit of Deputy Marshal as to Perishability.

UNITED STATES DISTRICT COURT.

JOHN L. MILLS
vs.
STEAMSHIP "ALLEGHENY" AND CARGO. } In Admiralty.

HORATIO C. WOOD, being duly sworn, deposes and says:

I am the Deputy Marshal appointed by the United States Marshal for the District of New Jersey, to keep the steamship *Allegheny* safely in custody. I have been in possession of
41 said steamer since the 14th of September, 1896. The steamer is in a badly damaged condition and cannot be safely secured without a further expenditure of a considerable sum. She is an iron or steel ship.

Her upper works have been blown off by dynamite in the process of raising her. About twenty feet of her bow has been cut off by a collision; her stern has been also torn or cut or blown off. Her port side is broken in by collision, the break extending several feet below water. A coffer-dam has been built over this, which has had to be once renewed at a large expense since the ship has been in my charge. With the utmost attention she leaks so badly that a steam tender with a steam pump, engineers and firemen, are required to be in attendance to keep her afloat.

This expensive custody of the ship has now continued
42 for more than three months, and with the charges for the attendance of a steam pump and wharfage and mooring lines, cables and chains with which to hold her, the expenses of the custody of the ship already incurred will exceed, as this deponent believes, the sum of Three thousand dollars. That the ship lies at the end of a long wharf which extends into the Dela-

ware River at the North end of Camden, and opposite to 43
Petty's Island. In drifting ice, which is now likely to occur, the coffer-dam could not be protected and the ship would sink. It is believed by this deponent that neither the mooring lines nor the wharf would suffice to hold a ship against a heavy and packing flow of ice. The ship is of deep draft, and there is no other wharf at which she could lie or be better secured. A trench can be dug along one side of the wharf by a mud-digging machine of sufficient depth to admit the ship. This will cost about $600, and would probably secure her against danger from ice.

This expedient has been considered by the Marshal and by the libellant, but neither of them was willing to advance the moneys required to hire the dredging machine. That said ship with constant attention is in a precarious situation, and once, while in deponent's custody, partly filled from some 44
sudden leaking of the coffer-dam, the cause of which is unknown.

HORATIO C. WOOD.

Sworn and subscribed to before
me this 17th day of December,
A. D. 1896.

CHARLES WELSH EDMUNDS,
[L.S.] *Notary Public.*

A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

45

46 At a stated Term of the District Court of the United States, for the District of New Jersey, held at the United States Court House, in the City of Trenton, on the Twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Present:—His Honor, ANDREW KIRKPATRICK, District Judge.

JOHN L. MILLS,

vs.

THE BRITISH STEAMSHIP "ALLEGHENY" AND CARGO.

Order Dismissing Motion to Vacate Sale.

47 This cause coming on to be heard upon a motion to vacate the order of sale of the said steamship *Allegheny* and cargo, and the Court having heard the argument of Mr. Horace L. Cheyney, proctor of the steamship *Caucase* in favor of said motion, and Mr. J. W. Robinson, proctor of claimants and salvors, and Mr. Curtis Tilton, proctor of libellant in opposition thereto, and having duly considered the same,

It is ordered, on motion of Curtis Tilton, proctor of the libellant, that the motion to vacate the order of sale be denied and dismissed, and that the sale of the said steamship *Allegheny*, her boilers, engines, machinery, apparel, cargo of oil, etc., as perishable, be made as heretofore ordered.

ANDREW KIRKPATRICK,
Judge.

48 A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

49

U. S. DISTRICT COURT,
DISTRICT OF NEW JERSEY.

JOHN L. MILLS
vs.
THE BRITISH STEAMER
"ALLEGHENY."

Marshal's Report of Sale.

In obedience to the *venditioni exponas* in the above stated case, I sold at public vendue on Tuesday, the 22d day of December, A. D. 1896,

The British steamer *Allegheny*, together with her cargo consisting of 200 barrels, some containing oil, to John L. Mills, of Camden, New Jersey, for the sum of eleven thousand one hundred and ten dollars ($11,110), he being the highest and best bidder. And I further report that in my opinion the price realized is a good and sufficient price for said vessel and cargo. 50

Dated December 22d, 1896.

GEORGE PFEIFFER, JR.,
U. S. Marshal,
by E. N. YARD,
Deputy.

A true copy.

GEORGE .T CRANMER,
Clerk.

[SEAL]
S 91

51

52

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

IN ADMIRALTY.

To the Honorable Andrew Kirkpatrick, Judge of the said Court:

The petition of Gustave Alix, master of the Belgian steamship *Caucase* (denying the jurisdiction of this Honorable Court in the premises, but intervening for the protection of his interest in a certain cause in this Honorable Court, whereof John L. Mills is the libellant and the British steamship
53 *Allegheny* is respondent), alleges and sets forth as follows:

First.—That on the twenty-second day of October, 1894, he filed his libel in the District Court of the United States for the District of Delaware, in admiralty, against the said steamship *Allegheny*, to recover for the damage sustained by the said steamship *Caucase* in a collision between the said vessels on October 1, 1894, and that thereupon a writ of attachment was duly issued out of said Court, to which the Marshal made return as follows:

"After diligent search, I hereby certify that I find the within-mentioned vessel within my district, in a wrecked condition, said vessel being sunk below the level of the water on the Delaware Bay, near Ship John Light, and I have been unable to attach the same."

Dated November 6, 1894.

54 So answers.

(Signed) HEWSON E. LANNAN,
U. S. Marshal.

Second.—On November 24, 1894, *alias* process of attachment in said action was duly issued out of said Court against the said steamship *Allegheny*, and in pursuance

thereof she was attached by the Marshal thereof on Decem- 55
ber 2, 1894.

Third.—Said steamship was finally raised by the salvors, but there being no wharf or place within the District of Delaware where the said steamship could be properly cared for, protected and repaired, it was desired by the salvors to remove her to Philadelphia, within the Eastern District of Pennsylvania, so that she might there be properly protected and cared for. Your petition, however, refused to permit said vessel to be removed from the territorial jurisdiction of the District Court of the United States for the District of Delaware, except in the custody of the Marshal of the District Court of the United States for the District of Delaware, under the attachment in the suit of your petitioner against her, and on further condition that the said steamship should remain in the custody of the Marshal under said 56
attachment until released therefrom by order or decree of said District Court for the District of Delaware.

Fourth.—Thereupon an agreement was entered into by the owners of the steamship *Allegheny* by their proctors, the petitioner, by his proctors, and by the salvors, wherein it was agreed that the said steamship should be brought to the City of Philadelphia, in the charge and custody of the Marshal of the District of Delaware, under said attachment, as is fully set forth in said agreement, a copy whereof is hereto attached and made a part hereof.

Fifth.—That upon said agreement being entered into, your petitioner, by his proctors, directed the Marshal of said District Court of Delaware to permit said steamship to be removed to Philadelphia in his custody under said attach- 57
ment, and thereupon said steamship was brought to the City of Philadelphia, in the charge and custody of the Marshal of the said District Court of Delaware, on or about the ninth day of March, 1895.

Sixth.—That the said steamship was subsequently taken under and by virtue of a further agreement of the

58 parties, attached to the original agreement, which is a part hereof, to a point in the Delaware River off Cooper's Point, Camden, New Jersey, where John L. Mills, the libellant undertook and proceeded to turn the said steamship, in pursuance of a contract made by him with the salvors, who had previously agreed that the vessel should be removed from the territorial limits of the State of Delaware, as is set forth fully in the agreement hereto attached.

Seventh.—At the time said vessel was taken from Philadelphia as aforesaid, notice was given to J. Willard Morgan, Esq., United States Commissioner, 206 Market Street, Camden, New Jersey, to George Pfeiffer, Jr., Esq., United States Marshal for the District of New Jersey, to the Sheriff of the County of Camden, New Jersey, and to Curtis Tilton, Esq., attorney acting for John L. Mills in the matter, that the said
59 vessel was under an attachment by the Marshal of the District Court of Delaware, under process issued out of said Court in the suit of your petitioner. Copies of said notices are hereto attached and made part hereof. Prior to the time the said vessel was taken to Cooper's Point, Camden, and prior to any work being done upon her by the libellant, he admitted and acknowledged by his attorney acting for him, that the said steamship was in the custody and possession of the Marshal of the District of Delaware, under the process in the suit of your petitioner, and desired your petitioner to agree that he, the said John L. Mills, libellant, should have a lien upon the said steamship *Allegheny* for any work he might do upon her, to which your petitioner refused to agree.

Eighth.—The proceedings commenced by your petitioner
60 on behalf of the steamship *Caucase*, in the District Court of the United States for the District of Delaware, are still pending, and the said steamship *Allegheny* has never been released or discharged in any way from said attachment therein, and your petitioner is advised and believes and therefore avers that the Marshal of the District Court of the

United States for the District of Delaware has never 61
relinquished his control or custody of the said steamship under said attachment, but has retained the same until the present time.

Ninth.—Your petitioner is advised and believes and therefore avers that at the time process was issued out of this Honorable Court upon the libel filed by John L. Mills, that the Marshal of the District Court of the United States for the District of Delaware had the steamship *Allegheny* in his custody and possession under said attachment, and that he or his deputy was ejected therefrom by the Marshal of this Court or by his deputies with force and with violence.

Tenth.—Your petitioner is advised by counsel and therefore avers that at the time the libel was filed in this Honorable Court on behalf of John L. Mills, and that at the time the writ of attachment was issued thereunder, the said 62
steamship *Allegheny* was in the lawful custody and possession of the Marshal of the District Court of the United States for the District of Delaware under said attachment, and is still in his lawful possession and custody, and that this Honorable Court never had jurisdiction of the said steamship and that the proceedings under said libel and attachment of said steamship *Allegheny* by the Marshal of this Court are invalid.

He therefore prays and suggests to the Court that the libel on behalf of John L. Mills against the steamship *Allegheny* be dismissed.

And he will ever pray, etc.

GUSTAVE ALIX,

By HORACE L. CHEYNEY, 63
JOHN F. LEWIS,

His Proctors.

64

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } *ss.*

HORACE L. CHEYNEY, being duly affirmed, says that he is proctor for Gustave Alix, the above petitioner, that the latter is now absent from the United States, and that he is familiar with the facts set forth in the foregoing petition, and that they are true to the best of his knowledge, information and belief.

HORACE L. CHEYNEY.

Affirmed and subscribed to before me, this twenty-fourth day of December, A. D. 1896.

65

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APRIL 25, 1895.

TO THE SHERIFF OF CAMDEN COUNTY,
Camden, New Jersey.

Dear Sir:

I have to notify you that I attached the British steamship *Allegheny*, &c., respondent in the above entitled cause, and by virtue of the process of the said Court issued in said cause, I have duly cited by advertisement in the daily papers at Wilmington, Delaware, all persons to appear and assert their claims. The said steamship *Allegheny* is to be moved temporarily to Camden, New Jersey, to be righted.

Very respectfully,

66 (Sgd) HEWSON E. LANNAN,
U. S. Marshal, District of Delaware.

APRIL 25, 1895. 67

J. WILLIARD MORGAN, ESQ.,
U. S. Commissioner,
206 Market Street, Camden, N. J.

Dear Sir:

I have to notify you that I attached the British steamship *Allegheny*, &c., respondent in the above entitled cause, and by virtue of the process of the said Court issued in said cause, I have duly cited by advertisement in the daily papers of Wilmington, Delaware, all persons to appear and assert their claims. The said steamship *Allegheny* is to be moved temporarily to Camden, New Jersey, to be righted.

Very respectfully,

(Sgd) HEWSON E. LANNAN,
U. S. Marshal, District of Delaware.

68

APRIL 25th, 1895.

GEORGE PFEIFFER, ESQ.,
U. S. Marshal for the District of New Jersey,
Trenton, New Jersey.

Dear Sir:

I have to notify you that I attached the British steamship *Allegheny*, &c., respondent in the above entitled cause, and by virtue of the process of said Court issued in said cause, I have duly cited by advertisement in the daily papers of Wilmington, Delaware, all persons to appear and assert their claims. The said steamship *Allegheny* is to be moved temporarily to Camden, New Jersey, to be righted.

Very respectfully, 69

(Sgd) HEWSON E. LANNAN,
U. S. Marshal, District of Delaware.

70 MAY 16th, 1895.

U. S. MARSHAL, DISTRICT OF DELAWARE.

Dear Sir:

Mr. John L. Mills, at whose shipyard in Camden, N. J., this steamer has been delivered, is about beginning the work of turning her right side up. As you know, others have tried and failed to do this work. It is a serious undertaking and will require a large expenditure by Mr. Mills, and, if he completes it successfully, he will expect the ship to remain in his possession until he is paid for the work. If you do not approve of such an undertaking, please take the ship away at once.

Very truly,

(Sgd) CURTIS TILTON,

Atty. for John L. Mills.

71

MAY 21st, 1895.

S. S. "ALLEGHENY,"

CURTIS TILTON, ESQ.,

Atty. for John L. Mills,

419 Walnut Street, Phila., Pa.

Dear Sir:

I acknowledge the receipt of your letter of May 16, 1895, and in reply thereto advise you that the *Allegheny* is under attachment by me under process issued out of the United States District Court for the District of Delaware. Please so inform Mr. Mills. I am not called upon to approve or disapprove any contract made in the premises.

72 Yours truly,

(Sgd.) HEWSON E. LANNAN,

U. S. Marshal.

IN THE UNITED STATES DISTRICT COURT 73

FOR THE DISTRICT OF DELAWARE.

ALIX, Master of the S. S. "CAUCASE,"

vs.

Steamship "ALLEGHENY."

TUCKER, Master of the S. S. "ALLEGHENY,"

vs.

Steamship "CAUCASE."

74

Stipulation of Counsel.

Whereas, the steamship *Allegheny* has been attached by the United States Marshal for the District of Delaware in a claim of damages alleged to have been sustained by the steamship *Caucase* by reason of a collision between the two steamships, in the bond as required in

And whereas the owners, underwriters and the salvors of the said steamship *Allegheny* desire that she shall be brought to the City of Philadelphia as promptly as possible, there being no facilities or dry dock to repair her in the State of Delaware:

It is hereby expressly stipulated by the Proctors in the above-entitled cause, that the removal of the said steamship *Allegheny* from the jurisdiction of the United States District Court for the District of Delaware shall not prejudice the 75
Master, owners or underwriters of the steamship *Caucase*, not the Master, owners or underwriters of the steamship *Allegheny* with respect to any of the rights which either of the said parties may have acquired by reason of the attachment of the *Allegheny* by the Marshal of the United States District Court for the District of Delaware, and the removal of the

said steamship from the District of Delaware shall not prejudice the rights of the owners or underwriters of the *Caucase* to assert that their lien for damages against the *Allegheny* is prior to that of the salvors not prejudiced the salvors nor the Master, owners or underwriters of the *Allegheny* with respect to their right to claim the benefit of the Limited Liability Acts of Congress, the intention of the parties hereto being that the jurisdiction shall remain as though the said steamship had not been removed from the State of Delaware.

It is also agreed that the removal of the said steamship from the District Court of Delaware, and the assent to said removal of the Master, owners and underwriters of the *Caucase* shall not prejudice them from filing a cross-libel against the owners of the steamship *Allegheny*, and requiring a bond to be entered to respond to the *Caucase's* claim, or otherwise to stay proceedings of the *Allegheny*, should such right exist, and also without prejudice to the Master, owners and underwriters of the steamship *Allegheny*, to reduce the bond for release required, if entitled so to do.

This agreement is to be construed in all cases as if the *Allegheny* were still within the jurisdiction of the District of Delaware, and still subject to the attachment of the Marshal until that status has been changed.

In Witness Whereof, the proctors for the steamship *Allegheny*, and for the steamship *Caucase*, and for the respective Masters, owners and underwriters thereof have hereunto set their hands and seals this day of March, A. D. 1895, and Mr. William W. Curtin undertakes to assent to this agreement also in behalf of the salvors.

JOHN F. LEWIS,
In behalf of Caucase and owners and underwriters.

J. RODMAN PAUL,
On behalf of steamship Allegheny, her owners and underwriters.

W. W. CURTIN,
On behalf of the salvors.

And it is agreed until further action and agreement, the 79
Allegheny to remain in the legal custody of the Marshal for the District of Delaware.

J. R. P.,
J. F. L.

April 24, 1895.

It is further agreed that the steamship *Allegheny* may be removed, still in the custody of the Marshal of Delaware to Mills' yard in the District of New Jersey for the purpose of being upturned and righted.

JOHN F. LEWIS,
For Caucase owners and underwriters.

J. RODMAN PAUL,
For steamship Allegheny, her owners and underwriters. 80

W. W. CURTIN,
For salvors.

IN THE UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF NEW JERSEY.

JOHN L. MILLS
vs.
S. S. "ALLEGHENY,"
her boiler, etc., and cargo. 81

Comes now J. W. Robinson, Proctor for the American Salvage Company, and hereby objects and excepts to the confirmation of the sale of the S. S. *Allegheny*, as shown by the United States Marshal's return on file herein, for the following reasons:

82 *First.*—Because the price realized, to wit, $11,000, was and is wholly inadequate to her value in her condition and at the time when sold.

Second.—Because insufficient notice of such sale was given.

Third.—Because of the conduct and doings of certain persons and especially of the United States Marshal of Delaware at the time and place of said sale.

And counsel hereby gives notice that with the permission of this Honorable Court he will use the affidavits of various persons in support of the foregoing objections and exceptions on the hearing thereof.

J. W. ROBINSON,
For the American Salvage Company.

83 Dec. 23, 1896.

A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

PHILADELPHIA, PA., Dec. 28, 1896.

GEO. T. CRANMER,
Clerk U. S. D. Court,
Trenton, N. J.

My Dear Sir:—

On the 23d I sent you "Exceptions" to the confirmation of sale of the S. S. *Allegheny*. I did this in order to place my client, the Salvage Co. in position to resist such
84 sale if desired, but without opportunity to consult them.

I have now submitted all the facts connected with her sale, condition, and the probable danger of loss by ice, costs and expenses of keeping her for a new sale, etc. And while they are very much disappointed at the price she brought in the light of her value as theretofore represented to them, still in view of the danger of her total loss by ice and storms

in the Delaware at this season of the year, together with the 85
heavy costs and expenses of keeping her and her deterioration from day to day, they are unwilling to assume the responsibility of bringing about a condition that may result in losing even this $11,000 to the salvors, and being unwilling to assume this responsibility, the Company cannot consistently ask others to do so.

And I am therefore directed to ask the Court for leave to withdraw my exceptions, and you will please submit this letter to the Court for that purpose.

I had intended to be present, but am called to Norfolk.

Please advise me of the Court's order, and oblige,

Yours truly,

J. W. ROBINSON,

[SEAL] *Counsel for A. S. Co.*

148 Duane St., New York. 86

A true copy

GEORGE T. CRANMER

[SEAL] *Clerk.*

DISTRICT COURT OF UNITED STATES,

DISTRICT OF NEW JERSEY.

JOHN L. MILLS,
vs. } In Admiralty.
THE STEAMSHIP "ALLEGHENY."

GUSTAVE ALIX, master of the steamship *Caucase*, alleging that he has heretofore filed his libel against the said 87
steamship *Allegheny* in the District Court of the United States for the District of Delaware, in admiralty, to recover for damage sustained by collision between the said steamships on October 1, 1894, and also alleging that the said steamship *Allegheny* is now in the custody of the Marshal of said District Court of Delaware under the process issued

88 upon said libel, and denying the jurisdiction of this Honorable Court in the premises, hereby files the following exceptions to the confirmation of the sale of the said steamship *Allegheny* by the Marshal of this Court, on Tuesday, December 22, 1896, to Curtis Tilton, attorney, for the sum of Eleven thousand dollars.

First.—That this Honorable Court had no jurisdiction in the premises.

Second.—That the said sum of Eleven thousand dollars is less than the real value of the said steamship *Allegheny*.

Third.—That the said sale was not sufficiently advertised by the Marshal.

Fourth.—That said sale was not properly advertised by the Marshal.

89 *Fifth.*—That said sale was not properly conducted by the Marshal of this Court.

Sixth.—By reason of a notice read at said sale by the Marshal of the District Court of the United States for the District of Delaware, persons were deterred from bidding for said steamship.

Seventh.—That the confirmation of said sale and the attempt to deliver possession of the said steamship *Allegheny* by the Marshal of this Court will probably produce disorder, as the Marshal of the District Court of the United States for the District of Delaware claims that she is now within his custody and possession, under a writ of attachment issued out of that Court.

HORACE L. CHEYNEY,

90 JOHN F. LEWIS,

Attorneys for Gustave Alix.

A true copy.

GEO. T. CRANMER,

[SEAL] *Clerk.*

At a stated Term of the District Court of the United 91
States, for the District of New Jersey, held at the United States Court House, in the City of Trenton, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and ninety-six.

Present:—His Honor, ANDREW KIRKPATRICK, District Judge.

JOHN L. MILLS *vs.* THE BRITISH STEAMSHIP "ALLEGHENY" AND CARGO.	ORDER DISMISSING EXCEPTIONS AND CONFIRMING MARSHAL'S SALE.

This cause coming on to be heard upon the exceptions 92
filed to the confirmation of the sale of the steamship *Allegheny* as perishable, and the Court having heard the argument of Mr. Horace L. Cheney, proctor of Gustave Alix, master of steamship *Caucase* and James McCaulley *et al.*, in favor of said exceptions, and Mr. Curtis Tilton, proctor of libellant, in opposition thereto (the exceptions to the said sale heretofore filed by the American Salvage Company having been withdrawn by Mr. J. W. Robinson, proctor of said Company) and all other exceptions, except as to jurisdiction, having been withdrawn, and duly considered the same, and the Marshal having reported that in obedience to the writ of *venditioni exponas* issued in this cause, he did, on the twenty-second day of December, A. D. 1896, sell the said steamship and cargo at public auction, having first duly advertised the same, to John L. Mills, of Camden, New 93
Jersey, for the sum of eleven thousand one hundred and ten dollars ($11,110), he being the highest and best bidder for the same, and that in his opinion the sum realized is a good and sufficient price for said vessel and cargo:

It is accordingly, on motion of Mr. Curtis Tilton, proctor of the libellant, ordered that the said exceptions be dis-

94 missed, and that the sale of the vessel and cargo be and the same is hereby confirmed, and that the Marshal execute to said purchaser a good and sufficient conveyance for said vessel and cargo.

ANDREW KIRKPATRICK,
Judge.

A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

Answer to Petition of Intervention of Gustave Alix.

95 DISTRICT COURT OF UNITED STATES,
DISTRICT OF NEW JERSEY.

JOHN L. MILLS,
vs.
S. S. "ALLEGHENY" AND CARGO.
} In Admiralty.

To the Honorable Andrew Kirkpatrick, Judge of said Court:

The answer of John L. Mills, libellant, to the petition of intervention of Gustave Alix, Master of the steamer *Caucase*, filed in this case, respectfully represents:

1. That all the allegations of said petition which set forth that the said steamer *Allegheny* was seized by the Dela-
96 ware Marshal at the suit of said Alix are denied, and if the said Marshal for the District of Delaware has so returned, the said return is false. The said steamer *Allegheny* had been in libellant's sole and undisputed possession, at Camden, N. J., for about eighteen months, when she was attached in this suit by the Marshal for the New Jersey District on September 14, 1896, and since then the said steamer has

been continuously in the possession of the New Jersey 97
Marshal.

From October, 1894, to the time she was delivered to libellant at Camden, N. J., in April, 1895, she was in the sole possession of the American Salvage Company, who had contracted to raise her from the bottom of the Delaware River and deliver her to her owners at Philadelphia, and she was brought by them to Philadelphia in pursuance of that contract, made three months before said pretended seizure by the Delaware Marshal.

2. That at the time of the pretended seizure of said wrecked steamer by the Marshal of Delaware, and at all times while the wreck was in or being towed through the District of Delaware, it was a physical impossibility for the said Marshal to take said wreck into his custody or make a lawful seizure thereof. The wreck was not then saved, was 98
bottom up, almost wholly submerged, and had as events have since proven, no value whatever, and was kept sufficiently afloat to be towed on the high tides only, by the constant use of the salvors wrecking appliances; and if the Delaware Marshal, who had no salvage appliances, had taken possession of said wreck, it would have sunk almost immediately and obstructed the navigable channel of the Delaware river, and would have been blown up by the United States authorities, as they repeatedly threatened to do, when the wreck was in a far less dangerous locality.

The Delaware Marshal was told this at the time of said pretended seizure, and he thereupon refused to take custody and control of said wreck or to become responsible for the same.

3. The allegation that said Delaware Marshal has been 99
in custody and possession of said wreck outside of his own District for over two years since said pretended seizure, during which time upwards of $30,000 have been spent in saving the wreck by the salvors in possession thereof, is a false pretence, made as libellant believes for the purpose of

100 unlawfully extorting custody fees for said long period. Libellant makes these averments because the said Delaware Marshal has offered to abandon his pretended custody of said wreck if custody fees were paid to him for said long period, although in point of fact he has not had any control, custody, possession or responsibility for the safety of said wreck. The said wreck is wholly without tackel or apparel and the Delaware Marshal has never had a rope of his own to secure the wreck, nor has he once placed a light on it at night, nor has any one furnished such rope or light for him, nor has he been once upon the wreck, nor had anything to do with the wreck, nor any one for him during said long period it has been in libellant's possession continuously at Camden, in the District of New Jersey.

4. The allegation that said wreck was brought out
101 of this District by the Delaware Marshal to be docked and repaired, under an agreement with the salvors, libellant avers to be false, and he is so advised and believes. Libellant made no such agreement, and he is advised and avers that none of the salvors signed or authorized the signing of said agreemeent; the libellant is further advised that said agreement is void, and that the law does not contemplate the repair of a vessel while in legal custody, nor its removal without provision for, or the possibility of its return. Since the said wreck came into the New Jersey District, the expenditure in said District by the libelant and others, of about $30,000 upon it has created all of its present value, namely a value of $11,000, for which sum it was sold by the New Jersey Marshal as perishable in this suit. The wreck after said expenditure is right side up, and is kept afloat by a coffer-
102 dam.

In that condition, or as a property of value, it has never been in the Delaware District and it is physically impossible to take it there.

5. That said intervening petitioner can have no lawful claim upon said steamer for collision, as the salvor's claims

for raising her, exceed her value when raised, and her owners 103
have abandoned her to the said contracting salvors, and no legal or equitable interest exists entitling said petitioner to intervene in this suit. The said petitioner has not given security for costs upon his said petition as required by the rules of this Honorable Court, and is not a party to the record. His remedy if he has a claim is against the Delaware Marshal, under said alleged return to the writ.

Wherefore, the libellant prays that said intervening petition, and all affidavits and exceptions filed under it, may be struck from the record as improvidently allowed to be filed, or should security for costs be entered by said petitioner, that it may be dismissed and the libellant awarded costs.

JOHN L. MILLS.

Sworn and subscribed to before 104
me, this 31st day of December, A. D., 1896.

CHARLES WELSH EDMUNDS,
[L.S.] *Notary Public.*

CURTIS TILTON,
Proctor.

A true copy.
GEORGE T. CRANMER,
[SEAL] *Clerk.*

105

106 At a stated Term of the District Court of the United States, for the District of New Jersey, held at the United States Court House, in the City of Trenton, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

Present:—His Honor, ANDREW KIRKPATRICK, District Judge.

Order for Leave to file Amendments to Answer to Petition of Intervention of Gustave Alix.

JOHN L. MILLS
vs.
THE BRITISH STEAMSHIP
107 "ALLEGHENY" AND CARGO.

On the annexed petition of John L. Mills, the libellant herein, verified the 14th day of January, 1897:

It is ordered, on motion of Curtis Tilton, proctor of the libellant, that the libellant be permitted to file the annexed amendments to the answer to the petition of intervention of Gustave Alix filed herein, and that the answer to the said petition of intervention stand amended accordingly.

ANDREW KIRKPATRICK,
Judge.

A true copy.

GEORGE T. CRANMER,
[SEAL] *Clerk.*

108

109

MILLS,

vs.

S. S. "ALLEGHENY" AND CARGO.

And now this fourteenth day of January, A. D. 1897, on motion of Curtis Tilton, proctor for libellant and by leave of Court the answer of the libellant to the petition of intervention of Gustave Alix filed herein, is amended by adding after Article 5th an additional paragraph numbered Article 6th, as follows:

6. That libellant is informed and believes and expects to prove that the American Salvage Company, claimant of said wrecked steamer *Allegheny*, denying the jurisdiction of 110
the District Court for the District of Delaware in said suit of Gustave Alix, have nevertheless tendered a bond or stipulation in said suit for the full value of the said steamer *Allegheny* at the time of said alleged seizure by the Marshal of Delaware and have filed a petition in said Delaware Court praying leave to enter and file such a bond or stipulation for value in said Alix suit. That it is the lawful right of the said claimants to enter said bond, and said bond takes the place of said steamer in said Delaware suit and the said Alix's only lawful remedy is against said bond; and no further claim or demand can be made of said steamer by said Alix or the said Delaware Marshal or Court at his instance.

And by adding at the end of Article 3d, the words following: That said wrecked steamer lay sunk near the mid- 111
dle of the river opposite libellant's shipyard and vessels navigating the river frequently passed her by day and at night and sound signals in foggy and thick weather as well as lights at night were indispensible to her safety. That the said Delaware Marshal never attempted to protect the said wreck and never made any pretence of guarding it in any

112 manner whatever, and if he ever had a claim to the possession of the wreck his total neglect to protect it from danger for eighteen months when it was lying sunk in the said navigated channel and out of his District was an unconditional abandonment by him of all such claim.

By adding in Article 4th, after the words "none of the salvors signed or authorized the signing of said agreement," the words following:

That W. W. Curtin who signed said paper is not a salvor but on the contrary is attorney-in-fact for the *Caucase* and for Gustave Alix and is the employer of Wm. H. La Boyteaux who verified the *Caucase* libel as the attorney-in-fact for Gustave Alix.

JOHN L. MILLS.

113 Sworn to and subscribed before
me this 14th day of January,
A. D. 1897.

H. R. EDMUNDS,
U. S. Commissioner.

CURTIS TILTON,
Proctor.

114

115

In the

DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

JOHN L. MILLS,

against

S. S. "ALLEGHENY," her Boilers, etc., and her Cargo.

Libel for Salvage.

To the Honorable ANDREW KIRKPATRICK, *Judge:*

The American Salvage Company, a corporation organized and existing under the laws of New Jersey, owner and 116
claimant of the steamship *Allegheny* and her recovered cargo, for its petition in intervention, claim and answer, alleges as follows:

First.—That in September, 1892, the steamship *Allegheny* was sunk in collision in the Delaware Bay below Ship John Lights and on the New Jersey State side of the channel, and as a result of such collision was lying on her beam ends on the bottom of said bay in about ten fathoms and wholly submerged.

That said ship was steel, double-decker, of British build, 320 feet in length, 42 feet beam and 28 feet hold, commonly called a "Tank Steamer," of 3800 tons burden and owned in England. Her cargo at the time she sank consisted of about 1,500,000 gallons of refined oil in her tanks, and about 1000 barrels of refined oil in her 'tween 117
decks. She was built in 1890, of the very best material, and her boilers, engines, etc., were in first-class condition when she went down, and her cargo was valuable.

Second.—That on October 6, 1894, the American Salvage Syndicate made a contract with the owners and under-

118 writers of said ship and cargo to raise her and deliver her at Philadelphia, and to recover as much of her cargo as practicable, and for such salvage services said syndicate was to receive the sum of $24,000 for raising the ship and 80 per cent. of the value of the cargo recovered, and that said contract was thereafter and upon the organization of the American Salvage Company transferred and assigned to it by said syndicate.

Third.—That on October 17, 1894, the salvors began the work of floating said ship, and after said salvors had at very great expense placed their collapsable cylinders and appliances in the bow and forward of midship for the purpose of righting said *Allegheny* and turning her on her keel, preparatory to floating her, and when just ready to do so, to wit, on October 29, 1894, and while said ship was still
119 lying on her beam ends, wholly submerged, the steamship *Siberian* ran into and inflicted upon her, the said steamship *Allegheny*, damages of a most serious character, tearing her bow completely off and destroying and carrying away all the cylinders and appliances of said salvors placed as aforesaid, and depriving said salvors of the use and benefit of said bow in turning said ship upon her keel and thus increasing immeasurably the labor, cost and difficulties of righting and floating said ship and changing the conditions altogether under which said salvors undertook to reclaim said ship and cargo, and made the compensation originally agreed upon wholly inadequate to the services performed.

Fourth.—But notwithstanding the changed conditions of said ship, and with the consent and approval of the owners
120 and underwriters of said ship and cargo, the salvors, at very great increased cost by reason thereof, secured additional appliances, cylinders, etc., and continued said salvage work, and on November 27, 1894, succeeded in raising the said ship *Allegheny*, but by reason of the changed conditions, and the loss of said bow as aforesaid, the said steamship floated bottom up.

That by the most difficult labor and expensive efforts, 121
the American Salvage Company, by and with its appliances, cylinders, etc., kept said ship afloat and towed her "upside down" to the City of Philadelphia, and then to Mills Ship Yard, at Camden, New Jersey, where said American Salvage Company delivered her to said libellant, to be by him righted, as in his libel set forth, and that said ship was from said tenth day of May, 1895, and until seized by the United States Marshal of New Jersey, on September 14, 1896, in the exclusive care, control and custody of the said John L. Mills, the libellant herein.

That the American Salvage Company had during all of said time a representative aboard of said ship *Allegheny* assisting in the work of righting said ship, but under the sole direction of said libellant.

122

Fifth.—That immediately after said collision, and the sinking of said steamship *Allegheny*, the greater quantity of oil in said tanks was forced out by the pressure of the water and lost, and much of the barrel oil was also lost.

Sixth.—That under the contract to raise the said steamship *Allegheny* and her cargo, the owners and underwriters of said ship reserved the right to abandon her to the salvors in lieu of paying the contract price for said salvage work, and that after said ship had been righted by Mills and floated to his dock, where she was seized by said United States Marshall for New Jersey, the owners and underwriters of said ship and cargo elected to abandon, and did, on October 1, 1896, abandon said ship to the American Salvage Company in lieu of paying for said salvage work, as was their right, under said salvage contract, to do. 123

7. That the labor and cost, etc., of raising and floating said steamship, and the use of the appliances, etc., by the American Salvage Company amounted to more than $40,000 in addition to the cost of the libellant, Mills, for turning and floating said ship at his shipyards.

124 And for answer to the libel of said John L. Mills, the American Salvage Company says:

1. It admits all the allegations set forth in the paragraphs "First," "Second," "Third" and "Seventh" of said libel.

2. The allegations of paragraph "Fourth" are admitted, except respondent denies any knowledge or information thereof, sufficient to form a belief, as to the cost for the labor, or materials, or special appliances for said work, as therein described, and demands the proof thereof, if the same be material.

The American Salvage Company admits that libellant is entitled, under his contract, to the sum of $5000 for turning said ship, and in addition thereto, the sum of $ for
125 raising and floating said ship in her submerged condition, after she had been turned, and for pumping her out and bringing her to the wharf, as salvage compensation therefor; but said company denies that said libellant is entitled to any other or any greater compensation for such services.

3. The American Salvage Company denies that the recovery of the oil in barrels cost libellant all they are or were worth, and if material demands the proof thereof, that all and singular the premises herein are true.

4. The American Salvage Company denies any knowledge or information thereof sufficient to form a belief as to the value of said ship when delivered at Mills' dock, except that on December 22, 1896, she was sold by the United States Marshal of New Jersey, at public auction, for the sum
126 of $11,000.

5. That the respondent has no desire to interfere with the decree *pro confesso* entered herein for want of an answer, but admits that said libellant is entitled to salvage and desires only to question the amount for which decree shall be entered.

Wherefore it prays that the Court may determine the 127
rights of libellant and administer justice in the premises.

That it may be allowed to intervene to defend against any party intervening herein claiming any portion of the fund created by the sale of said steamship *Allegheny*.

That it may be allowed to share in the proceeds of such sale and to receive the excess, if any, over the salvage claims established against said fund.

And to all other relief to which it may be entitled.

J. W. ROBINSON,
Proctor for the American Salvage Company.

Sworn to and subscribed before
me this sixth day of January,
A. D. 1897. 128

GEORGE W. CLEMENT,
Notary Public.

Office Supreme Court, U. S.
FILED.
MAR 1 1897
CLERK.

Supreme Court of the United States.

Ex-parte GUTAVE ALIX. | October Session, 1896. | No. 15, Original.

IN RE MOTION TO QUASH RETURN.

Brief on behalf of Petitioner.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Of Counsel.

348–349 Bourse Building.
Philadelphia.

Supreme Court of United States.

Ex-parte GUSTAVE ALIX. } No. 15, October Session, 1896.

ORIGINAL.

In re Motion to Quash Return.

I.

Upon suggestion of Gustave Alix, this Court granted a rule to show cause why writ of prohibition should not issue to the District Court of New Jersey, restraining further proceedings in that Court against steamship "Allegheny." The petition alleged that the "Allegheny" had been previously attached in the District of Delaware and had been removed from that District to Camden, New Jersey, in the custody of the marshal, by agreement of parties, and that while she was still in his custody a libel was filed against her in the District Court of New Jersey and an attachment was thereupon issued and the marshal of the District of Delaware was forcibly dispossessed by the marshal of the District of New Jersey.

II.

The return to the rule to show cause does not contain a complete copy of the record in the Court below as required by Rule 8.

This defect appears affirmatively by the following concluding paragraph:

> "All the proceedings of this Court are set forth in the appendix. An *ex-parte* affidavit filed by said

> Alix without leave and without notice, or the using or reading of the same in this Court and averring matters not provable *ex-parte* was improperly filed and has not been included."

The affidavit referred to was one made by the Delaware marshal, setting forth in detail his attachment of the "Allegheny" and possession of her under the attachment and his dispossession by the New Jersey marshal.

The petitioner Alix filed exceptions in the Court below to the confirmation of the sale of the "Allegheny" as perishable, averring that the Court had no jurisdiction in the premises. The affidavit referred to was presented and filed in support of that exception at the hearing before the Court. The exception was dismissed and the sale was confirmed. No objection has even been made heretofore to the affidavit in any way. No motion has ever been made to strike it off and it still remains as a part of the record of the Court below. All of which a complete copy of the record will show.

Counsel for petitioner only ask that the full record shall be sent up to speak for itself. If the affidavit is open to all the objections suggested in the return, proper weight will be given to it in this Court.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Of Counsel for Petitioner.

Court, U. S.
MAR 1 1897
JAMES H. McKENNEY, CLERK.

Supreme Court of the United States.

Ex-parte GUTAVE ALIX. } October Session, 1896. No. 15, Original.

IN RE MOTION FOR LEAVE TO TAKE TESTIMONY.

Brief on behalf of Petitioner.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Of Counsel.

348–349 Bourse Building.
Philadelphia.

Supreme Court of United States.

Ex-parte GUSTAVE ALIX. } No. 15, October Session, 1896. ORIGINAL.

Motion for Leave to take Testimony.

I.

Upon suggestion of Gustave Alix, this Court granted a rule to show cause why writ of prohibition should not issue to the District Court of New Jersey, restraining further proceedings in that Court against steamship "Allegheny." The petition alleged that the "Allegheny" had been previously attached in the District of Delaware and had been removed from that District to Camden, New Jersey, in the custody of the marshal, by agreement of parties, and that while she was still in his custody a libel was filed against her in the District Court of New Jersey and an attachment was thereupon issued and the marshal of the District of Delaware was forcibly dispossessed by the marshal of the District of New Jersey.

II.

In this case the right of custody of the steamship "Allegheny" is claimed by the District Court of Delaware and the District Court of New Jersey. The petition alleged the seizure by the Delaware marshal (which is shown by the records of that Court), the removal of the ship, by agreement, in his custody to Camden, New Jersey, and his dispossession by the marshal of New Jersey. Some of these facts are

denied by the return of the Judge of the District Court of New Jersey and this Court cannot intelligently pass upon the matter in the absence of proof of the facts. The petitioner therefore asks for leave to take testimony in support of the petitioner as provided by Rule 12, or in such other manner as may be agreed upon by the parties.

HORACE L. CHEYNEY,
JOHN F. LEWIS,
Of Counsel for Petitioner.

APPELLANTS DIAG M CORRECTED TO
AGREE WITH TES 10NY OF MASTER
AND PILOT OF : DELAWARE

(CORRECTION IN TED LINE
THUS ———)

SSE

5 PTS
(2)

LIMIT

OF

5 PTS
(3)

5 PTS
(4)

BUOY 62
RED ELECTRIC

IMPROVED

RED CAN BUOY

2 PTS
(4)

2 PTS
(3)

W BY S.

CHANNEL

IMIT

OF

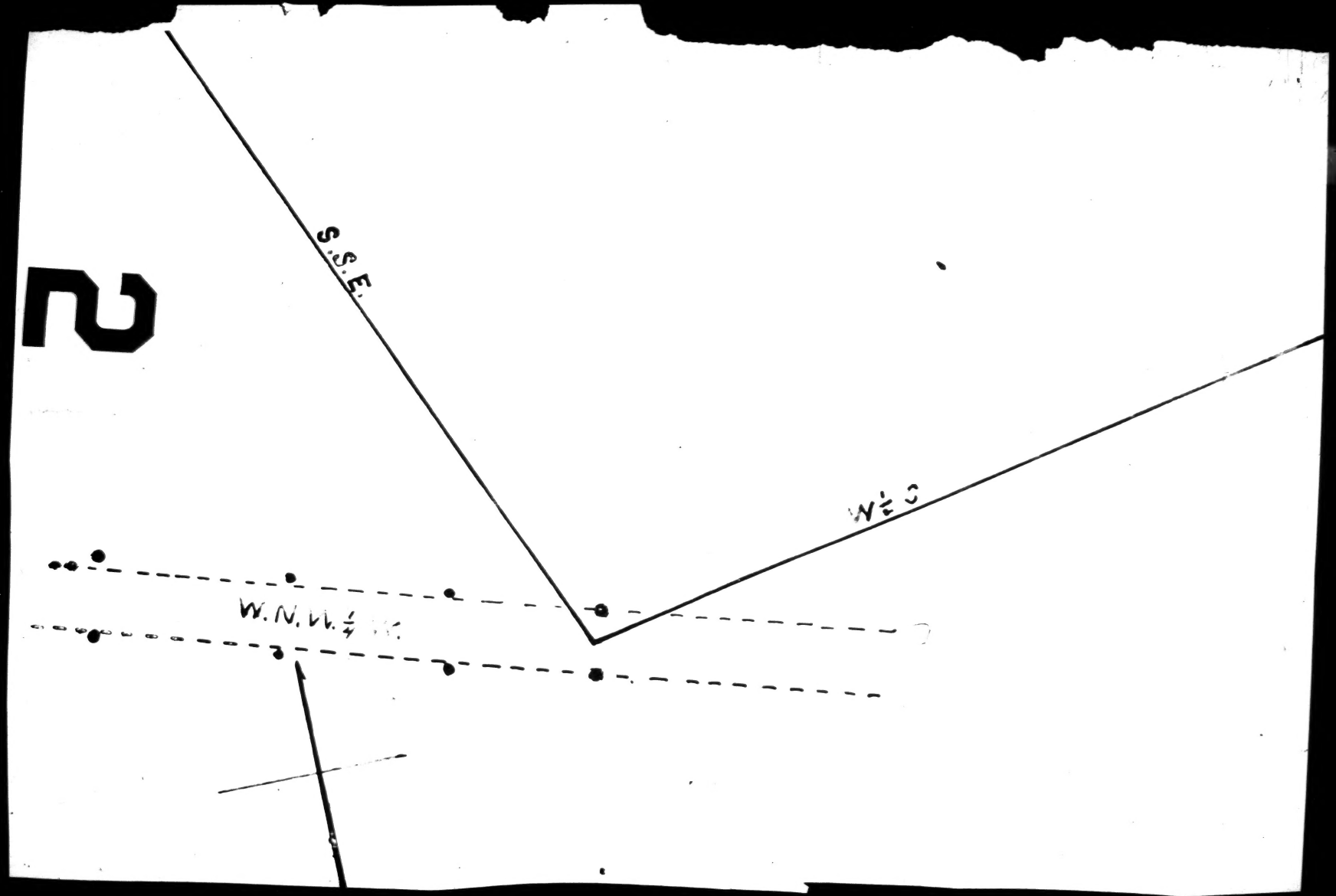
WRECK

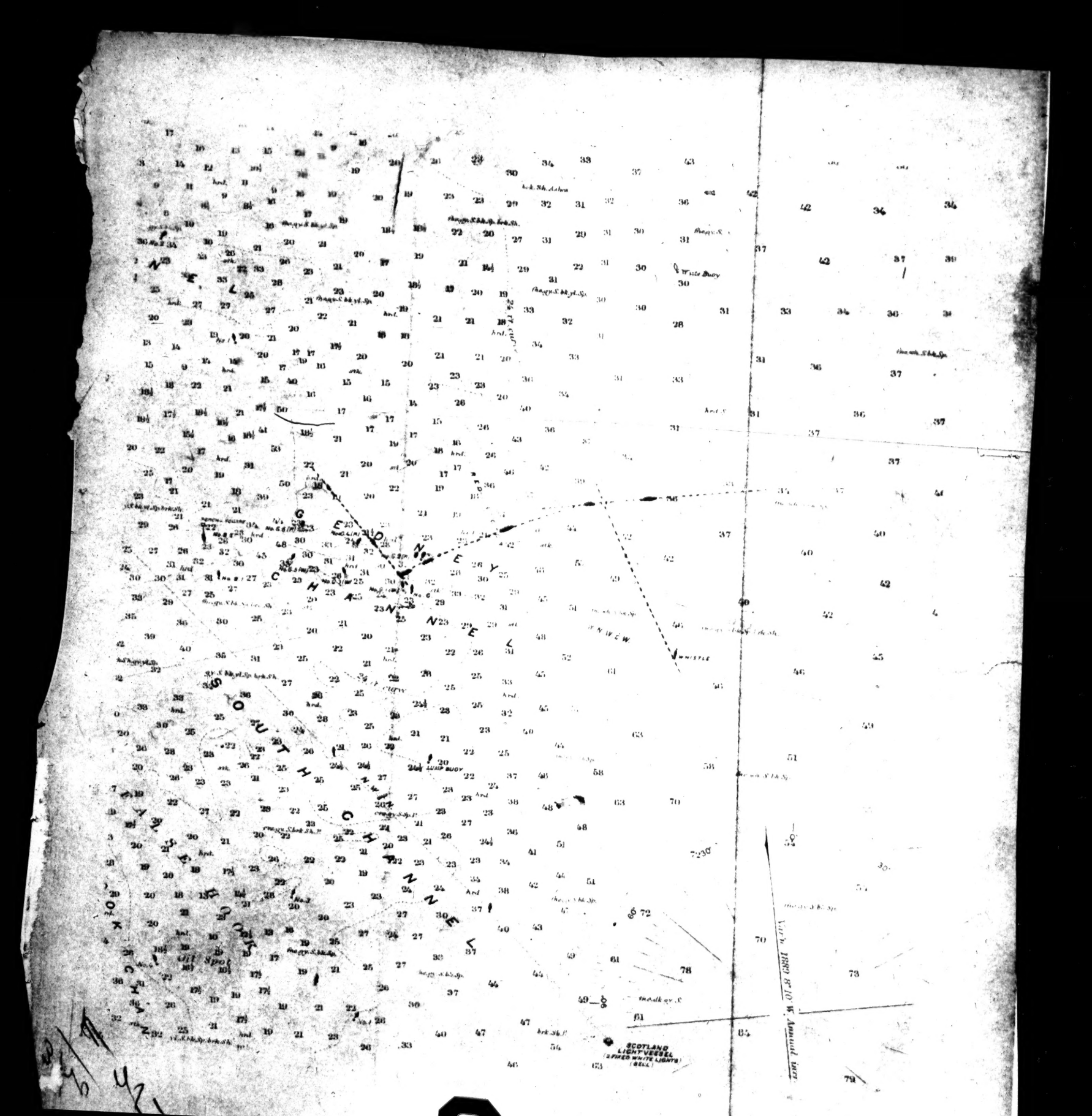
BUOY
WHISTLE

BLACK CAN BUOY

CHANNEL

(28)


S.S.E.
W. N. W. ¼ W.


GEORGES
SOUTH CHANNEL
NEW YORK
SOUTH CHANNEL
Whistle
Lump Buoy
White Buoy
SCOTLAND
LIGHT VESSEL
(2 FIXED WHITE LIGHTS)
(BELL)
Variation 1889 8° 10' W. Annual Mean

DRIGGS

TALISMAN

5 PTS

SSE.

SE by S.

BUOY 64
RED ELECTRIC

LIMIT OF IMPROVED CHANNEL

BUOY 62
RED ELECTRIC

RED CAN BUOY

2 PTS

BUOY 63
WHITE ELECTRIC

LIMIT OF IMPROVED CHANNEL

WRECK

BUOY 61
WHITE ELECTRIC

BLACK CAN BUOY

PILOT STATION

W. by S

500 400 300 200 100 0

Libis.

GO RNMENT

1 Positio

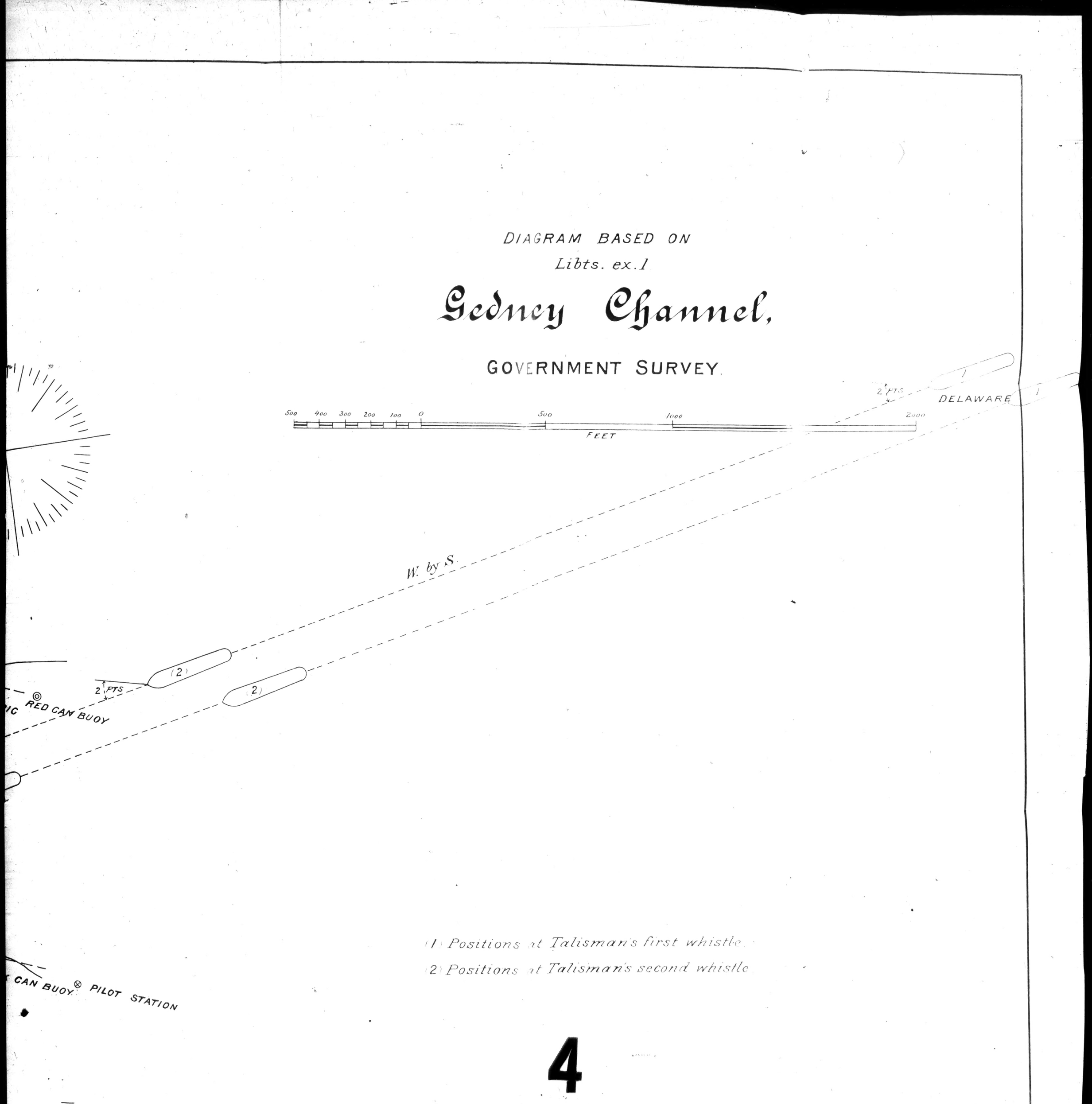
2 Positio

4

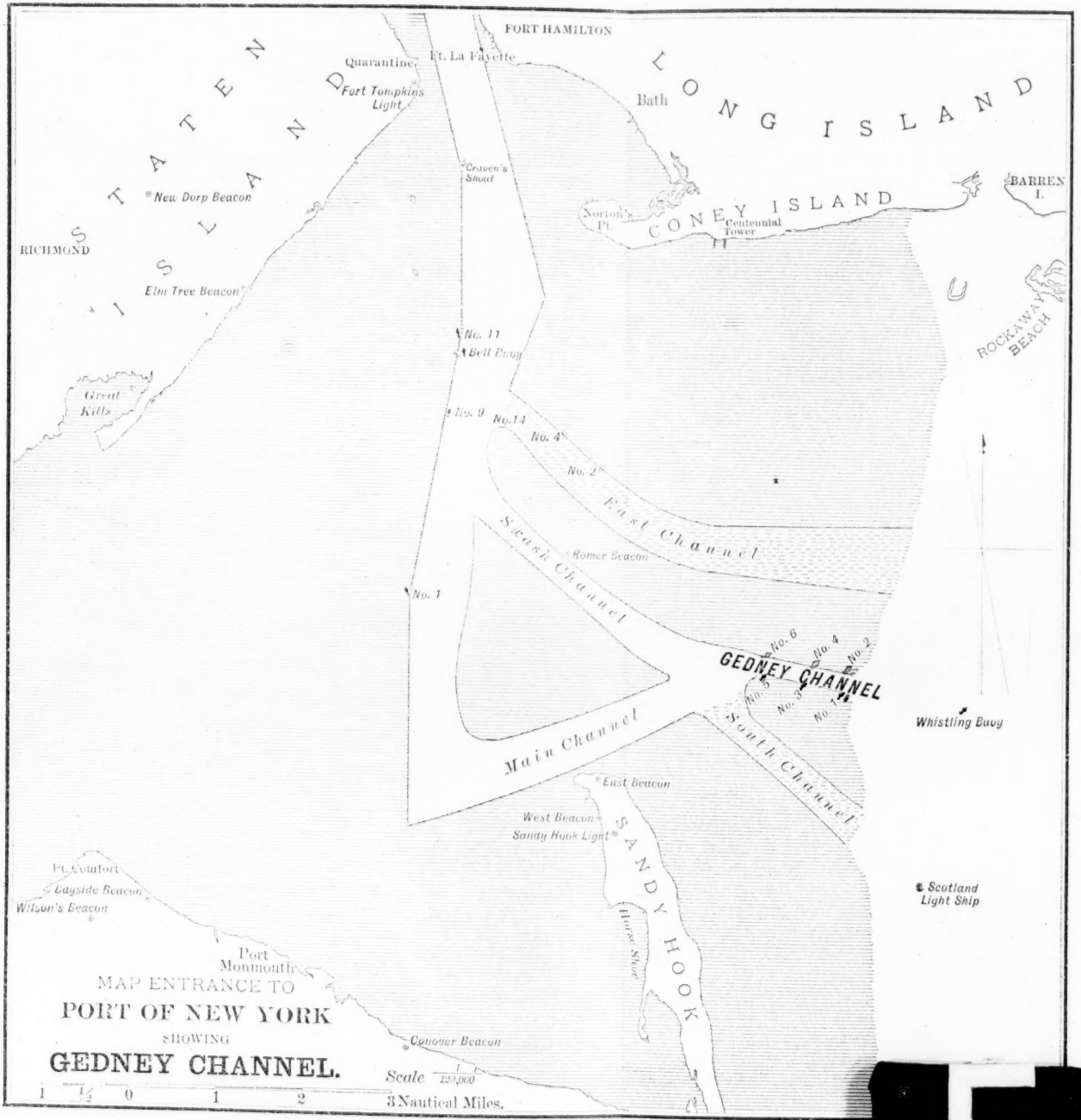
DIAGRAM BASED ON
Libts. ex. 1

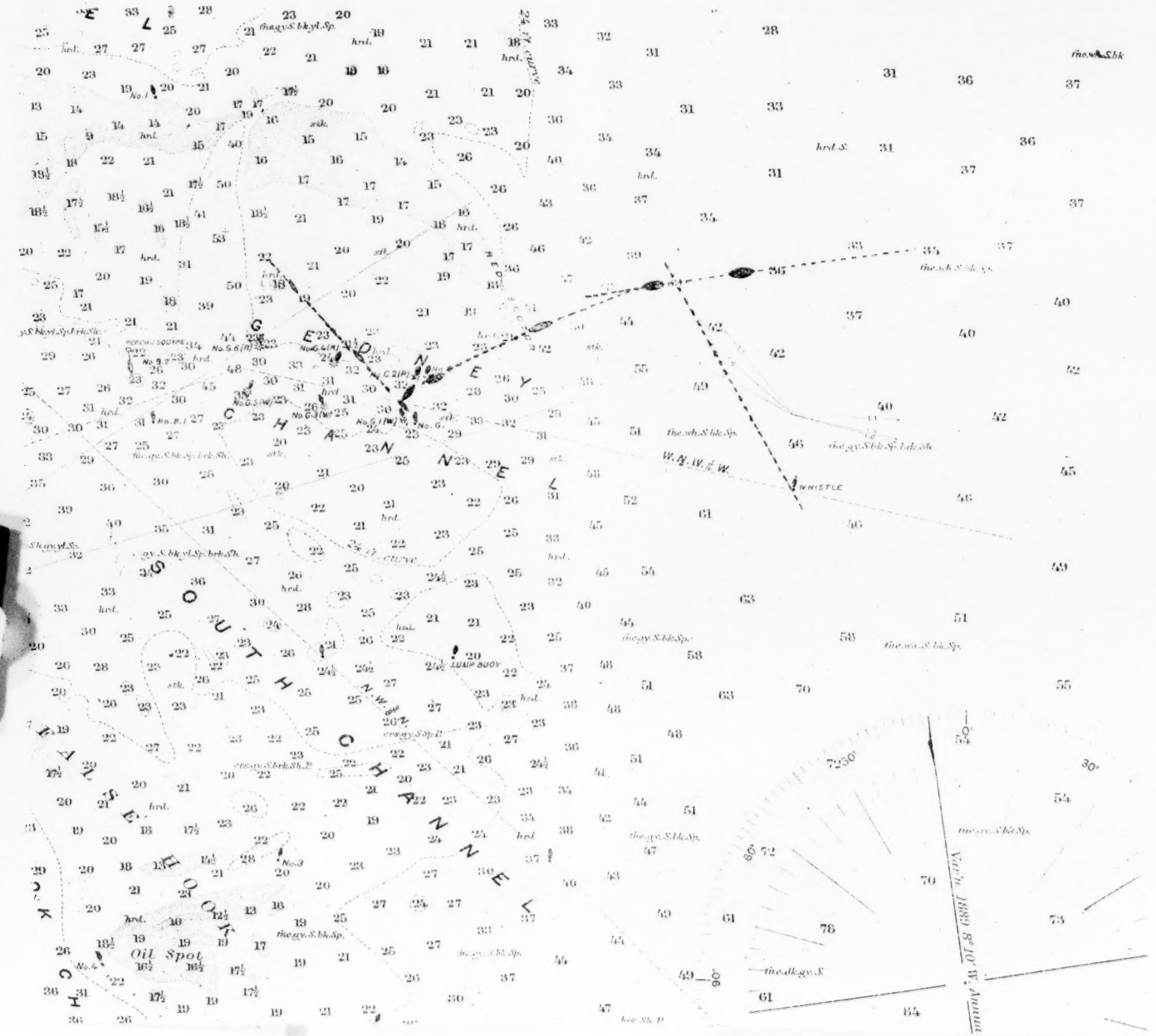
Gedney Channel,

GOVERNMENT SURVEY.



(1) Positions at Talisman's first whistle.
(2) Positions at Talisman's second whistle.


FORT HAMILTON
Quarantine
Ft. La Fayette
Fort Tompkins Light
Bath
LONG ISLAND
STATEN ISLAND
Craven's Shoal
New Dorp Beacon
Norton's Pt.
CONEY ISLAND
Centennial Tower
BARREN I.
RICHMOND
Elm Tree Beacon
ROCKAWAY BEACH
No. 11
Bell Buoy
Great Kills
No. 9
No. 14
No. 4
No. 2
East Channel
Romer Beacon
Swash Channel
No. 1
No. 6
No. 4
No. 2
GEDNEY CHANNEL
No. 5
No. 3
No. 1
Whistling Buoy
Main Channel
South Channel
East Beacon
West Beacon
Sandy Hook Light
SANDY HOOK
Ft. Comfort
Bayside Beacon
Wilson's Beacon
Scotland Light Ship
Port Monmouth
House Shoal
Conover Beacon
MAP ENTRANCE TO
PORT OF NEW YORK
SHOWING
GEDNEY CHANNEL.
Scale 1/120,000
1 1/2 0 1 2 3 Nautical Miles.


SOUTH CHANNEL
EAST CHANNEL
Oil Spot
No.1
No.2
No.3
No.4
No.5
No.6
No.7
No.8
No.9
No.10
No.11
No.12
No.13
No.14
No.15
No.16
No.17
No.18
No.19
No.20
No.21
No.22
No.23
No.24
No.25
No.26
No.27
No.28
No.29
No.30
No.31
No.32
No.33
No.34
No.35
No.36
No.37
No.38
No.39
No.40

APPELLANTS DIAGRAM CORRECTED TO
AGREE WITH TESTIMONY OF MASTER
AND PILOT OF THE DELAWARE

(CORRECTION IN DOTTED LINE
THUS

BILL OF COSTS. (35) AVERY HERRICK, Publisher and Printer, Albany, N. Y.

In Supreme Court.

The People of the State of New York
against
The New York New Haven and Hartford Railroad Company. } Costs.

COSTS.

	$	
Costs before Notice of Trial		
" after " and before Trial		
Additional Defendants served		
Trial Fee, Issue of Fact		
" " " Law		
Allowance by Statute		
" " Court		
Costs of Motion for		
Trial occupied more than two days		
Appointment of Guardian for Infant Defendant		
Procuring injunction order		
Examination of party before Trial		
Attending and taking deposition de bene esse		
Drawing interrogatories to annex to Commission		
Making and serving Case		
" " " Amendments to Case		
" " " Case of more than fifty folios		
Term Fees, for following terms, viz:		
Costs of Motion for New Trial, Special Term		
Proceedings before and after granting New Trial		
Applicat'n for Judg't on Spec'l Verdict, before Argument,		
Applicat'n for Judg't on Special Verdict; for Argument,		
Appeal to General Term; before Argument		
" " " for Argument		
term fees as follows:		
Appeal to Court of Appeals; before Argument	30	
" " " for Argument	60	
term fees as follows:		
Preparing Case on Appeal to Court of Appeals		
Damages in Court of Appeals for delay		
Interest on Verdict		
	90	00
DISBURSEMENTS AS PER NEXT COLUMN	24	62
TOTAL COSTS AND DISBURSEMENTS	114	62

DISBURSEMENTS.

	$	
Referee's Fees		
Commissioner's Fees		
Clerk's Trial Fee, $ ___ do for ent'g judg't, $ 50		50
Paid for Searches		
" Affidavits and Acknowledgements as follows:		
Serving Summons and Complaint		
Paid Referee settling case		
Certified Copies Orders as follows, viz:		
Clerk filing Ex'n and entering satisfaction		13
Transcript and filing		
Copy Judgment for Roll		
Postage incurred $ 4nd, to be incurred $ ___		30
Juror's fees		
Stenographer's Fees Copy		
Sheriff's Fees on Execution		69
" " Attachment		
" " ___ terms as above		
Copy Minutes		
For Printing Cases		
" " Points	21	00
" remittitur	2	00
" Copies following Papers:		
Witnesses' fees [illegible] statement below		
	24	62

I hereby certify that I have adjusted this bill of cost at $114.62
MAY 25 1894
CLERK

SCHEDULE "A."

Witness Fees. (*) ___ *Commenced,* ___ 18

NAMES.	RESIDENCE.	Miles from Court House.	Miles Traveled.	Number of Days attended.
	Costs adjusted at $114.62 May 21 1894 Page & Taft Attys for Defts & Appts			
No 128 N.Y., N.H. & H.R.R. Co. vs People of the State of New York } $168				

(*) "Circuit," "Special Term," "Hearing."

SCHEDULE "A."

Witness Fees, (*) _____ *Commenced,* _____ 18

NAMES.	RESIDENCE.	Miles from Court House.	Miles Traveled.	Number of Days attended.

(*) "Circuit," "Special Term," "Hearing."

_____ *County of* _____ *ss:* _____

being duly sworn, says he is the _____ in this action, which was at issue and neccessarily upon the calendar for trial at the several Circuits held in and for the County of _____ at the Court House in the _____, viz: One commenced on the _____ day of _____ 18 _____ One commenced on the _____ day of _____ 18 _____

That the cause WAS REFERRED TO _____ AND † was brought to trial before _____ at _____

That each of the persons named in Schedule A, hereunto annexed, which is made a part hereof, attended the several‡ _____ therein named pursuant to a subpœna, or upon special request of this _____ as a witness for the _____ the number of days set opposite their respective names therein. That the residence of said witnesses respectively, the distance therefrom, according to the usual traveled route, to the said § _____ and the number of miles they severally traveled as such witnesses, according to the usually traveled route, for the purpose of going to the place of trial and returning therefrom, at said ‡ _____ respectively, are correctly stated and set forth in said Schedule A, opposite their respective names. That each and every of said persons named in said Schedule A was a necessary and material witness on the part of the _____ on the trial of this action.

Sworn and Subscribed before me this _____ *day of* _____ 18 } _____

† Erase SMALL CAPITALS if no refe.ence, ‡ "Circuits"—special terms"—"hearings." § "Court House"—"place of hearing."

_____ *County of* _____ *ss:* _____

being duly sworn, says, he is _____ attorney for the _____ herein; that the foregoing disbursements, except witness fees, have been actually made and incurred herein on the part of said _____ except those hereafter to be incurred, and those deponent believes to be correctly stated. That the cause was necessarily on the Calendar the terms above named, and was not tried, or was postponed thereat, by order of the Court; that no charges for a copy of a document or paper is made therein, except for a copy of a document or paper actually and necessarily used or necessarily obtained for use.

Sworn and Subscribed before me, this _____ *day of* _____ *18* }

In Supreme Court.

The People of the State of New York

against

The New York New Haven and Hartford Railroad Company

Plaintiff's Costs

AND NOTICE OF ADJUSTMENT.

SIR :

The within is a Copy of the Items of the _____ *'s Costs and Disbursements in this action, and the same will be adjusted by the Clerk of* _____ *County, at his office, in the* _____ *on the* _____ *day of* _____ 18 _____ *at* _____ *o'clock* _____ *M.*

Yours, &c.,

J. E. Hancock Attorney for Plaintiff

Plaintiff's Attorney

Office address, _____ New York.

Post-office address, *Capitol Albany* New York.

To _____ Esq

_____ *'s Attorney*

(Indorsed on back:)
83. 80 F No. 2. City of Santa Fé *vs.* The United States. Filed Feb. 11, 1895. James H. Reeder, Clk. By Ireneo L. Chaves, Dept. C.

PLAT

OF THE

CITY OF SANTA FE GRANT.

In Townships 16 and 17 N. Ranges 9 & 10 E. of N. M. Principal Meridian

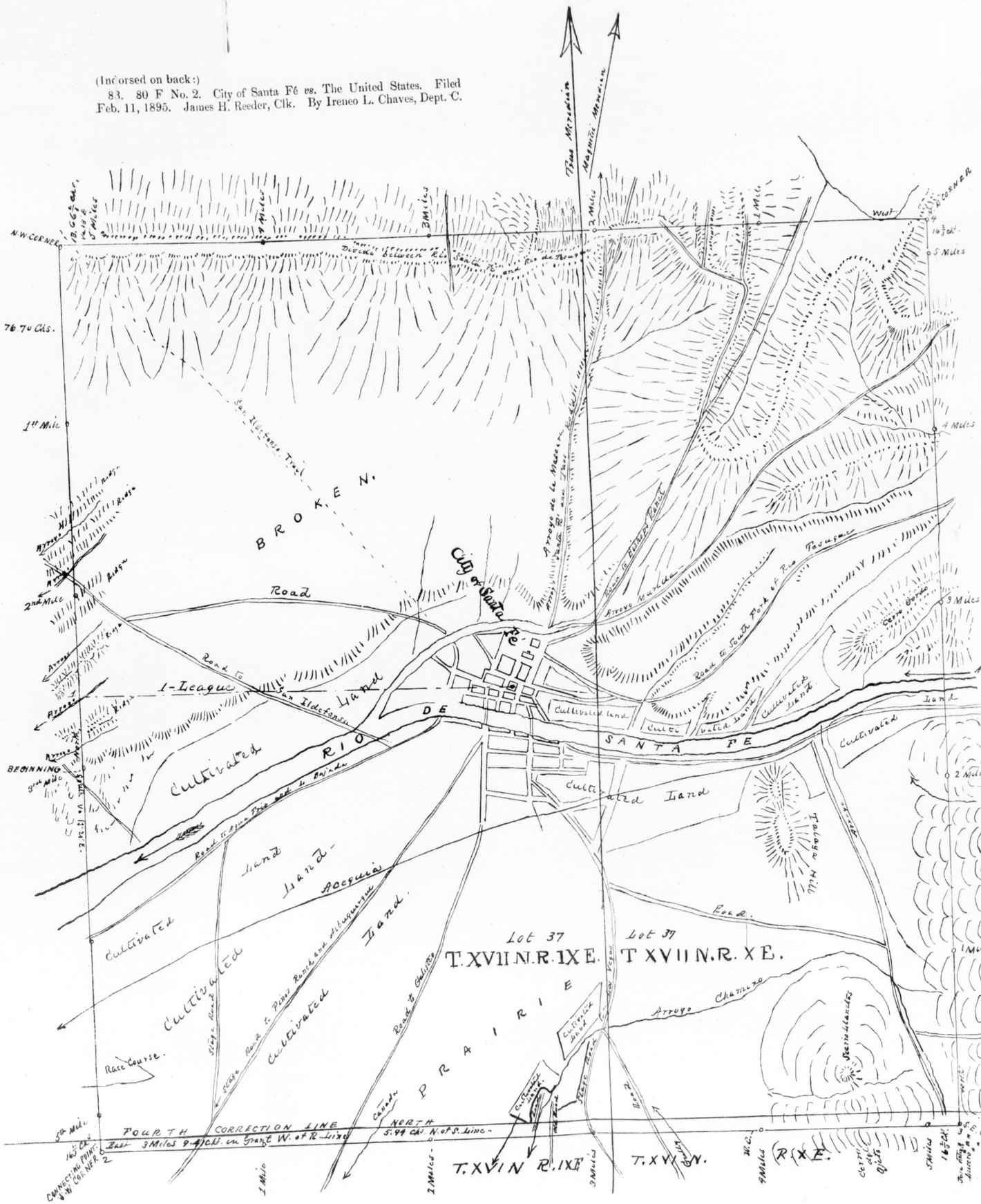
Content = 17361.11 Acres.

Scale-2 Inches to 1 Mile

no. 877.
U. S. States
v.
Santa Fe
} D. 226

BOUNDARIES.

Numbers	Courses.	Distances Ms. Chs.
1.	South	2. 16⅔
2.	East	5. 16⅔
3.	North	5. 16⅔
4.	West	5. 13 56⅔
5.	North	2. 76.70
	Aggregate	20 60,26⅔



No 504
U States
v.
Santa Fe
} p. 5

Sketch Plat
of
Grant
to
Manuel Trujillo
for the
Talaya Tract

Content = 1003.55 Acres.

Scale - 10 Ch.s = 1 Inch.

Court of Land Claims No. 116.

True Meridian.

Grant of Jose Antonio Lucero
Court of Private Land Claims No. 117

Santa Fé River

Donavan's Mill

Santa Fé River

1M.

Santa Fé & El Macho Road.

Old Mill

Acequia Madre

Beginning Cor.

Road

Road

Arroyo Blanco

Grant
of
Marquez & Padilla
Court of Private Land Claims No. 77.

S.W. Corner.

Rock Bluff.

Reservoir

N.E. Corner.

Cañon

Eastern line of the Santa Fé League

Cañon

Cañon

Cañon

Santa Fé Grant
Court of Private Land Claims No. 196.
Talaya Mountain

1M.

52.60 Chs.

S.E. Corner.

Cañon

Sketch Map of the Juan Cayetano Lobato Grant No 103 East of Antonio Dominguez Claim 105 Refered to in North, printed record pp 45 and 89.

Lands of Manuel Tenorio

Arroyo Tenorio

Aug. 20. 1742.

Archive No 85.

Acequia Madre.

House Antonio Dominguez-
Houses of Manuel Tenorio
and. Miguel de Coca.

Archive No. 440

Archive no 823

J. Cayetano (Ruins)

House of Lobatto. Caides of the Acequia Madre

Acequia Madre.

R.68

Armenta House (Ruins)

239.

345

Road to El Ojito.

East Ranchito Arroyo Tierra Blanca.

Arroyo Talaya

Talaya Grant to Manuel Trujillo.

West Road

GRANT

Area 700 Acres (about)

Arroyo San Antonio.

Acequia

Road to Pecos

ANTO. DOMINGUEZ. Archive No. 1742

Road to Galisteo

Acequia N. Branch.

Galisteo

LOS PINOS ARROYO.- Middle Branch-

Pecos

S. Branch.

Aug. 26, 1742.

CAYETANO

Archive No. 445.

JOSE DURAN GRANT.
1743. Archive No. 237.

Sec. 25

Sec. 30

Pecos

City limits

Scale, 10chs.= One inch

Arroyo de piedra

Sebastian de Vargas Grant

T. 17 N.

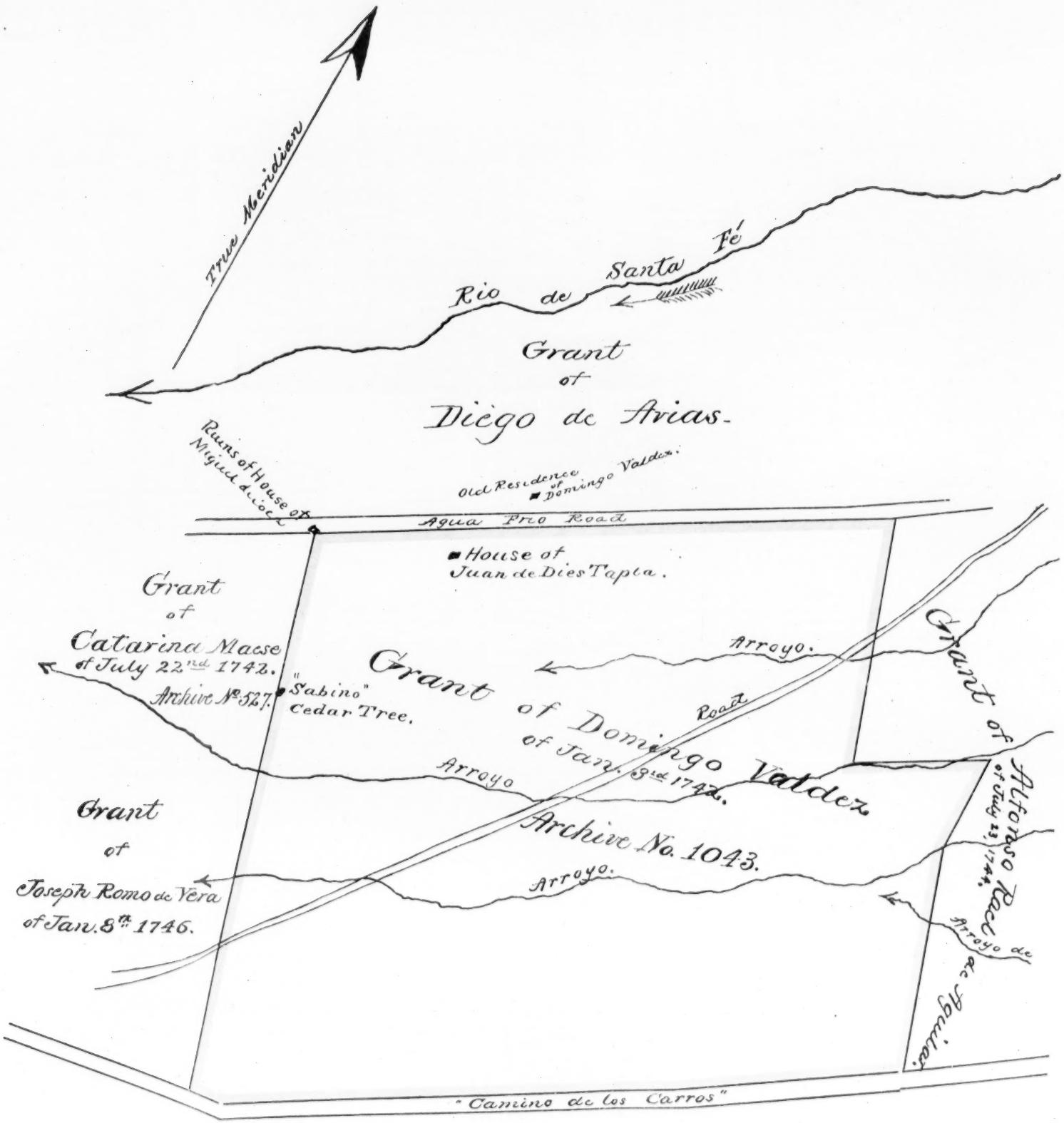
Chamiso Arroyo.

Arroyo Aguage.

Barrigue y Padilla Grant.

No. 504
U.States
v.
Santa Fe
p 29.

R. 9 E. Sec. 36 Sec. 31 R. 10 E.



Grant
of
Juan F. Rodriques.

No 504.
U States
v.
Santa Fe
} p. 61

12